TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922

No. 169

BANKERS TRUST COMPANY AND JOHN McMULLEN, EXECUTORS OF THE ESTATE OF LENA McMULLEN, DECEASED, PLAINTIFFS IN ERROR,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF CONNECTICUT.

FILED SEPTEMBER 28, 1922.

(28,479)

(28,479)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 524.

BANKERS TRUST COMPANY AND JOHN McMULLEN, EXECUTORS OF THE ESTATE OF LENA McMULLEN, DECEASED, PLAINTIFFS IN ERROR,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF CONNECTICUT.

INDEX.

	Original.	Print.
Record on appeal to supreme court of errors	1	1
Application in the nature of an appeal to the superior court from the finding of the tax commissioner	1	1
Writ and summons	2	2
Sheriff's return	4	2
Entry of appearance of Hon. Frank E. Healey, Attorney General, and Charles W. Cramer for the defendant	4	3
Entry of appearance of Hon. Frank E. Healey, Attorney General, and Carlos S. Holcomb for the defendant	5	3
Defendant's demurrer to the reasons of appeal	5	4

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1921.

	Original.	Print.
Stipulation for reservation to the supreme court of errors.	6	4
Reservation to the supreme court of errors	7	5
Docket entries	8	6
Amendment to reasons of appeal	8	6
Demurrer to amended reasons of appeal	9	7
Stipulation for incorporation of amendments in the record	10	8
Opinion of the supreme court of errors	12	8
Judgment of the supreme court of errors	22	14
Defendant's motion for judgment in superior court	23	15
Final judgment of the superior court	23	15
Clerk's certificate to the record	24	16
Petition for writ of error	25	16
Assignment of errors	27	18
Order of allowance of writ of error	29	19
Bond	31	19
Writ of error	33	21
Clerk's certificate of lodgment of writ and bond	35	22
Citation and service	36	22
Clerk's return to the writ of error	38	23

1 To the Honorable Superior Court to be Held at Bridgeport, Within and for the County of Fairfield, on the First Tuesday of June, 1920:

The application of the Bankers Trust Company, a corporation organized under the laws of the State of New York and located in the City of New York, and John McMullen of Norwalk, Connecticut, as they are the executors under the will of Lena McMullen, late of said Norwalk, deceased, respectfully represents:

1. Lena McMullen died at Norwalk, Conn., on the 20th day of May, 1919, leaving a will which was duly approved and admitted to probate at the Probate Court for the District of Norwalk, in the State of Connecticut.

2. Your applicants, the Bankers Trust Company and John McMullen were named in said will as executors thereof and they were by said Court of Probate confirmed as such executors and duly qualified by said Court of Probate.

3. Thereafter, your applicants duly filed with the Tax Commissioner of the State of Connecticut an affidavit in accordance with chapter 50 of the Public Acts of 1919.

4. Thereafter, on March 24th, 1920, the Tax Commissioner of the State of Connecticut filed with the State Treasurer and with said Court of Probate a written finding or statement that there was due from the Estate of Lena McMullen to the State of Connecticut under sections 1189 to 1195, both inclusive, of the General Statutes of 1918, a tax in the amount of $10,286.39.

2 5. By said proceedings the Tax Commissioner has made claim upon said estate for said sum of $10,286.39 and insists that said tax should be paid before your applicants shall be permitted to make their final accounting as executors of said estate.

6. Your applicants are aggrieved by said act of the Tax Commissioner in that the Tax Commissioner is without legal authority to make or file such statement of tax and because the statutes aforesaid under which the Tax Commissioner assumes to proceed are invalid, unconstitutional and without legal effect.

Wherefore your applicants as such executors make this application in the nature of an appeal from said statements of the Tax Commissioner in accordance with the statute in such cases made and provided and prays;

That the Court inquire into the allegations of this application and annul said statements or finding of tax and declare the same to be illegal and of no effect, and grant such other relief as the law in the premises allows.

Dated at Bridgeport, Connecticut, this 10th day of May 1920.

THE BANKERS TRUST COMPANY,
JOHN McMULLEN, *Executors,*
By PULLMAN & COMLEY,
Their Attorneys.

1—524

To the Sheriff of the County of Hartford or His Deputy Within Said County, Greeting:

By authority of the State of Connecticut, you are hereby commanded to notify and summon William H. Blodgett of Hart-
3 ford, Connecticut, as he is the Tax Commissioner of the State of Connecticut, to appear before the Superior Court to be held at Bridgeport, within and for the County of Fairfield on the first Tuesday of June 1920, then and there to answer to the within and foregoing appeal of The Bankers Trust Company of New York City and John McMullen of Norwalk, Connecticut, executors of the Estate of Lena McMullen, late of Norwalk, deceased, from the statement, levy and ascertainment of a tax against the Estate of Lena McMullen, by leaving a true and attested copy of this application and of this citation with the said William H. Blodgett, Tax Commissioner of the State of Connecticut, as aforesaid, at least twelve days before the first Tuesday of June 1920.

The Bankers Trust Company of New York City and John McMullen of Norwalk, Conn., as principals and John S. Pullman of Bridgeport, Conn., as surety, of all of whom are known to me to be of sufficient financial responsibility do acknowledge themselves, jointly and severally bound unto the said William H. Blodgett, as he is the Tax Commissioner as aforesaid, in the sum of $150, and that said The Bankers Trust Company and John McMullen, who have taken the within and foregoing appeal shall prosecute their said appeal to effect and comply with and conform to the orders and decrees of the Superior Court in the premises.

Hereof fail not, but of this application and citation due service and return make.

WILLIAM H. COMLEY, JR.,
Commissioner of the Superior Court for Fairfield County.

Filed May 25, 1920.
FRED W. TRACY,
Clerk.

4 STATE OF CONNECTICUT,
County of Hartford, ss:

Hartford, Conn., May 20th, 1920.

Then and by virtue hereof, and by direction of the plaintiff attorney, I on this 20th day of May, 1920 served a true and attested copy of the within application and citation upon the within named defendant by leaving the said copy in the hands of Mr. E. Potter, Assistant Tax Collector, at the office of the within named defendant. The within is the original with my doings thereon endorsed.

Attest:

GEORGE F. ROBERTS,
Deputy Sheriff, Hartford County.

Copies	1.00
Service	.12
End.	.24
Travel fees	1.14
	$2.50

State of Connecticut,

Tax Commissioner,

State Capitol.

Hartford, Conn., June 1st, 1920.

Clerk of the Superior Court,
Fairfield County,
Bridgeport, Connecticut.

DEAR SIR:

Please enter the appearance of Hon. Frank E. Healy Attorney-General for the State of Connecticut and Charles W. Cramer as attorneys for Wm. H. Blodgett, Tax Commissioner of the State of Connecticut in re appeal of the Bankers Trust Company and John McMullen as executors under the will of Lena McMullen from the imposition of a penalty tax so called, which appeal is returnable to the Superior Court for the County of Fairfield for the first Tuesday in June, 1920.

Yours truly,

CHARLES W. CRAMER,
Inheritance Tax Attorney.

Filed June 3, 1920.
FRED W. TRACY,
Clerk.

State of Connecticut,

Tax Commission,

State Capitol.

Hartford, Conn., August 12, 1920.

Clerk of the Superior Court,
Fairfield County,
Bridgeport, Conn.

DEAR SIR:

Will you please enter the appearance of Attorney-General Frank E. Healy and myself for the appellees in the case of appeal from the

Tax Commissioner by Bankers Trust Co. and John McMullen, Executors.

Yours very truly,

C. S. HOLCOMB,
Inheritance Tax Attorney.

Superior Court, Fairfield County, August 9, 1920.

Appeal from Tax Commissioner by BANKERS TRUST CO. & JOHN MCMULLEN, Executors.

Demurrer to Reasons of Appeal.

The State of Connecticut and William H. Blodgett, Tax Commissioner of The State of Connecticut, and acting for said State, demur to the reasons of application and appeal, because the grievances alleged and the reasons of appeal set forth merely conclusions of law; and the law is not in any respect as set forth therein.

WILLIAM H. BLODGETT,
Tax Commissioner, and
6 THE STATE OF CONNECTICUT.
FRANK E. HEALY,
Attorney-General.
C. S. HOLCOMB,
Inheritance Tax Attorney.

Filed Aug. 16, 1920.
FRED W. TRACY,
Clerk.

Superior Court, Fairfield County, September 14th, 1920.

THE BANKERS TRUST COMPANY and JOHN MCMULLEN, Executors.

vs.

WILLIAM H. BLODGETT, Tax Commissioner.

Stipulation for Reservation of Questions of Law for the Advice of the Supreme Court of Errors.

In the above entitled action it is hereby stipulated and agreed between The Bankers Trust Company and John McMullen, Executors, Appellants, and William H. Blodgett, Tax Commissioner, Appellee, that the advice of the Supreme Court of Errors is desired upon the issues of law raised by the demurrer to the reasons of appeal; that the present determination of said questions by the Supreme Court of Errors will be in the interest of simplicity, directness and economy in judicial action for the reason that the cause is ready for final

judgment and the determination of the questions raised aforesaid will finally dispose of the matter in controversy between the Appellants and Appellee in said cause; and that both parties desire a speedy determination of the questions of law at issue between them; and that both parties request that such questions be reserved for the advice of the Supreme Court of Errors next to be held at Bridgeport, Conn., within and for the Third Judicial District on the fourth Tuesday in October 1920.

7 BANKERS TRUST COMPANY AND
JOHN McMULLEN,
Executors,
By PULLMAN & COMLEY,
Their Attorneys.
WILLIAM H. BLODGETT,
Tax Commissioner.
By CARLOS S. HOLCOMB,
His Attorney.

Filed September 23, 1920.
FRED W. TRACY,
Clerk.

Superior Court, Fairfield County, September 23, 1920.

THE BANKERS TRUST COMPANY and JOHN McMULLEN, Extrs.,

vs.

WILLIAM H. BLODGETT, Tax Commissioner.

Reservation.

At the request of and with the consent of all the parties in the above entitled cause the Court reserves the questions of law arising upon the Appellee's demurrer for the advice of the Supreme Court of Errors to be held at Bridgeport within and for the Third Judicial District of Connecticut on the Fourth Tuesday in October 1920, as to what judgment should be rendered this Court on the Appellee's demurrer.

KEELER,
Judge.

Filed Sept. 23, 1920.
FRED W. TRACY,
Clerk.

8 *Docket Entries.*

1920.

2. June 3. Frank E. Healy, App. for State of Conn. filed.
3. Aug. 16. Demurrer to reasons of appeal filed.
3½. Aug. 14. Frank E. Healy and Carlos S. Holcomb, App. for Appellees filed.
4. Sept. 23. Stipulation de Reservation to Supreme Court filed.
5. Sept. 23. Reservation filed.

Supreme Court of Errors, Third Judicial District, January 19, 1921.

BANKERS TRUST COMPANY et al., Executors (Est. of Lena McMullen),

vs.

STATE OF CONNECTICUT.

(Appeal from the Tax Commissioner.)

Amendment to Reasons of Appeal.

The appellants in the above-entitled action amend paragraph 6 of their reasons of appeal to read as follows:

Your applicants are aggrieved by said act of the Tax Commissioner and are unable to agree with the Tax Commissioner upon the amount of such tax, and they further allege that the Tax Commissioner is without legal authority to make or file such statement of tax and that the statutes aforesaid under which the Tax Commissioner assumes to proceed are invalid, unconstitutional, and without legal effect, because they violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, Section 10 of Article 1 of the Constitution of the United States, and Secion 13 of Article 1 of the Constitution of the State of Connecticut.

THE APPELLANTS,
By PULLMAN & COMLEY,
Their Attorneys.

9 The filing of the foregoing amendment is hereby consented to by the appellee.

THE APPELLEE,
By FRANK E. HEALY,
Per C. S. H.,
CARLOS S. HOLCOMB,
His Attorney.

(Filed by leave of Court, January 19, 1921.)

Superior Court, Fairfield County, January 18, 1921.

APPEAL FROM TAX COMMISSIONER

vs.

BANKERS TRUST COMPANY and JOHN McMULLEN, Executors.

Demurrer to Amended Reasons of Appeal.

The State of Connecticut and William H. Blodgett, Tax Commissioner of The State of Connecticut, and acting for said State, demur to the amended reasons of application and appeal, because

1. The grievances alleged and the reasons of appeal set forth merely conclusions of law; and the law is not in any respect as set forth therein.

2. It is not alleged nor does it appear that the failure to agree with the amount of tax as determined by the Tax Commissioner is due to the fact that the assessment was made otherwise than in the manner and according to the requirements of Sec. 1190 of the General Statutes.

3. It does appear from the matter alleged in the application that the Tax Commissioner in making and filing such statement was acting in accordance with law and was not acting contrary to the constitution of the United States or of the State of Connecticut.

WILLIAM H. BLODGETT,
Tax Commissioner, and
THE STATE OF CONNECTICUT.
FRANK E. HEALY,
Attorney General.
CARLOS S. HOLCOMB,
Attorney for the Tax Commissioner.

Filing assented to.

BANKERS TRUST CO. AND
JOHN McMULLEN,
By PULLMAN & COMLEY,
Their Attorneys.

(Filed by leave of court, January 19, 1921.)

Superior Court, Fairfield County, January 19, 1921.

THE BANKERS TRUST COMPANY and JOHN MCMULLEN, Executors,

vs.

WILLIAM H. BLODGETT, Tax Commissioner.

Stipulation.

It is hereby stipulated and agreed that the plaintiffs' amendment to their reasons of appeal, and the defendant's demurrer to said amended reasons of appeal, shall be fully incorporated in and made a part of the record as if filed on the date on which the reasons of appeal, and the defendant's demurrer to said reasons of appeal were in fact filed and all objections because of the date of filing of
11 said amendments are hereby waived by the parties paintiff and defendant.

BANKERS TRUST COMPANY AND
JOHN MCMULLEN,
Executors,
By PULLMAN & COMLEY,
Their Attorneys.
WILLIAM H. BLODGETT,
Tax Commissioner.
By CARLOS S. HOLCOMB,
His Attorney.

(Filed by leave of Court, January 19, 1921.)

12 Supreme Court of Errors, Third Judicial District, Fairfield County, Bridgeport, January Term, 1921.

BANKERS TRUST CO. et als.

vs.

STATE OF CONNECTICUT.

Application in the nature of an appeal under par. 1192 of the General Statutes, to which the State interposed a demurrer; the court at the request of and with the consent of all the parties reserved the questions of law arising upon the demurrer for the advice of this court. Judgment advised to sustain the demurrer and dismiss the appeal.

Arthur M. Comley, for the plaintiffs.

William E. Egan and Carlos S. Holcomb, with whom, on the brief, was Frank E. Healy, Attorney-General, for the defendant.

WHEELER, *C. J.*:

The plaintiffs, the duly qualified executors under the will of Lena McMullen late of Norwalk, filed with the Tax Commissioner of Connecticut an affidavit in accordance with Chapter 50 of the Public Acts of 1919, and thereafter the Tax Commissioner filed with the State Treasurer a statement that there was due from the estate of Lena McMullen to the State of Connecticut by virtue of its statutes, $10,286.39 and made claim for such sum. Thereupon the executors made this application in the nature of an appeal from said claim to which the defendant demurred. The single point raised by the demurrer is that the statutes (see foot-notes) which authorize this action of the Commissioner are unconstitutional.

14 The obvious legislative purpose is to compel estates to pay to the state a sum which shall approximately equal the taxes which property of the estate has escaped paying while in the hands of the decedent. The power of an owner to transfer property owned by him to his legatee or to have the distributee named by the law receive it "is a privilege granted by the state which may properly dictate the terms on which the privilege may be enjoyed." Nettleton's Appeal, 76 Conn. 235, 242, 56 Atl. 565, 567; Hatheway v. Smith, 79 Conn. 506.

G. S., Par. 1190. All taxable property of any estate upon which no town or city tax has been assessed as provided in Section 1189 or upon which no tax has been paid to the state during the year preceding the date of the death of the decedent, shall be liable to a tax of two per centum per annum on the appraised inventory value of such property for the five years next preceding the date of the death of such decedent, provided, the executor or administrator of any estate may, by furnishing evidence to the satisfaction of the Tax
13 Commissioner that a state, town or city tax has been paid on any of such property for a portion of said five years or that the ownership of such property has not been in the decedent for a portion of said period, obtain a proportionate deduction from the tax hereby imposed, and provided, the administrator or executor of such estate may furnish evidence to the Tax Commissioner that the appraised value of the estate is not in excess of two thousand dollars and a portion of the same passes by will or pursuant to the provisions of the statutes relating to the distribution of intestate estates, to the widow or minor children, as provided in Sec. 1189."

G. S., Sec. 1192. "Any executor, administrator or representative of such an estate aggrieved by the action of the Tax Commissioner in determining such tax, if unable to agree with the Tax Commissioner upon the amount of such tax as provided in Sec. 1190, may, within ninety days from the time of the filing by the Tax Commissioner of such statement or corrected statement with the judge of probate, make application in the nature of an appeal therefrom to the Superior Court of the county in which such probate court is located which shall be accompanied by a citation to said Tax Commissioner to appear before such court."

Chap. 50, Public Acts 1919. "The executor of every will and the administrator of every estate, except as hereinafter provided, at the time of filing the inventory and appraisal of such estate with the court of probate, shall, in addition thereto, file an affidavit in duplicate setting forth the items included in such inventory on which a tax has been assessed by any town or city during the last completed taxing period, or paid to the state during the year next preceding the date of the death of the decedent, the assessed value of each item and the place of the assessment or payment of the tax on each item, and the judge of probate shall send to the tax commissioner, with the copy of each inventory required to be sent to said commissioner, a copy of such affidavit."

The succession tax by whatever name it is called is a tax upon the privilege of receiving or transmitting property after death and hence the tax is laid upon that portion of the estate which passes to the beneficiaries. Unless there be some beneficial succession there is nothing to which a succession tax can be attached. Hopkin's Appeal, 77 Conn. 644, 653, (60 Atl. 657, 661.)

The tax imposed by Sec. 1190 G. S. is upon the gross value of that portion of the estate which has not paid a state or local tax in the year preceding the decedent's death.

Another distinguishing mark of the succession tax is the classification which all succession taxes make and this is absent from this tax. These two characteristics make it clear that whatever else this tax is it is neither a succession tax nor in the nature of one. The succession tax is upon the transfer, not upon the individual nor upon property. And the public authorities and the members of the profession have never so regarded Sec. 1190 and uniformly treated it as a penalty in the nature of an estate tax. Sec. 1190 includes within its provisions both real and personal property. But the plaintiffs probably correctly diagnose the situation leading up to this statutory tax when they say in their brief, "It is a matter of
15 common knowledge that the prime purpose and the chief effect of the statute is to obtain an exaction from personalty and especially from that kind of personalty known as choses in action." Under this section property which has not been subject to a town or city or state tax during the year preceding the death of the decedent is liable to a tax of two per centum of its appraised inventory value for the five years next preceding the date of death of decedent provided that a proportionate reduction of this tax may be had by proof that any part of the tax has been paid or that the decedent did not own any of this property during this period. The pecuniary liability imposed by this act is a penalty in the nature of a tax for an omission to list property for taxation. Punishment is the end of a penalty. "In the municipal law of England and America the words "penal" and "penalty" have been used in various senses. Strictly and primarily they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offence against its laws." * * * The test whether a law is penal, in the strict and primary sense is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." Huntington v. Attrill, 146 U. S. 657, 667. "The words "penal" and "penalty," in their strict and primary sense, denote a punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws." Plumb v. Griffin, 74 Conn. 132, 134. The wrong sought to be enforced by this tax is a wrong which has been done the public treasury. The necessities of government give the state the right to tax property for such purposes and in such amounts as it may determine subject only to such restrictions as may be imposed by the constitution, and with the power to tax must go the power to enforce collection of the tax by all summary means not contrary to the constitution,
16 and one of those means is the right to impose penalties in order to compel payment and as a punishment for evasion

or neglect of this duty owed the public. Cooley on Taxation (3d Ed.) Vol. 1, p. 899; Meyers v. Park, 8 Heisk (Tenn.) 564; Western Union Tel. Co. v. Indiana, 165 U. S. 804; Ex parte Lynch, 16 S. C. 32; 37 Cyc. 1542. The amount of the penalty is within the legislative discretion. These have been sustained up to fifty per cent in Western Union Tel. Co. v. Indiana (supra). Ex parte Lynch, 16 S. C. 32; Scott v. Watkins, 22 Ark. 565; Lacey v. Davis, 140, 157; Cooley on Taxation 3d Ed. p. 899 and cases cited in notes.

This tax may or it may not represent what the decedent would have been required to pay had he paid the state or local tax. The entire five years tax may be compelled when in fact nothing over one year is due but the representative of the decedent cannot prove the fact. The state presumes it is unpaid for the five year period and requires the executor or administrator to disprove this. This is not the compulsory payment of a defined tax but is the infliction of a punishment for a violation of a public duty. The authors of this statute intended it as and for a penalty tax and such we esteem it to be. The right of the state vests at the death of the decedent to the transfer tax or the penalty in the nature of an estate tax. As a penalty tax it is open to every constitutional objection which can be urged against property taxes. So far we find our views run in harmony with the plaintiffs' argument; from this point on we find our conception of the case completely divergent from the rest of their argument, the points of which we take up in our own order.

1. Sec. 1190, is not void as an expost facto law. "An ex post facto act relates to crimes." Bridgeport v. Hubbel, 5 Conn. 240.
17 "At an early day it was settled by authoritative decision in opposition to what might seem the more natural and obvious meaning of the term ex post facto, that in their scope and purpose these provisions were confined to laws respecting criminal punishments and had no relation whatever to retrospective legislation of any other description, and it has therefore been repeatedly held, that retrospective laws when not of a criminal nature do not come in conflict with the national constitution unless obnoxious to its provisions on other grounds than their retrospective character."

2. Sec. 1190 does not impose an excessive fine in violation of Section 13 of Article 1 of the Constitution of Connecticut. The term "penalty" in its broadest sense includes all punishment of whatever kind. A. & E. Ency. of Law, Vol. 13, p. 53. A fine is always a penalty but a penalty may not always be a fine. United States v. Nash, 111 Fed. 525. A fine is a "pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor." Bouvier Law Dictionary, 1225; Southern Express Co. v. Walker, 92 Va. 59, 63; Village of Lancaster v. Richardson (N. Y.) 4 Lans. 136, 140. The offense here punished is neither a crime nor a misdemeanor and the constitutional provision invoked has no possible relation to it.

3. The third ground upon which the constitutionality of this statute is attacked is that it is in conflict with the Fourteenth Amendment to the Constitution of the United States in that it deprives the

creditors and distributees of this estate of their property without due process of law (*a*) by exacting a penalty from them for the failure of the decedent to list his property for taxation and, (*b*) by creating against them a presumption of guilt for such omission. Both claims rest upon the unfounded premise that the property of this
18 estate upon the decease of the owner passed to the distributees subject to the payment of the just debts of the estate.

The right to dispose of one's property by will and the right to have it disposed of by the law after decease is created by statute and therefore the state may impose such conditions upon the exercise of this right as it may determine. Stone et al. appeal, 74 Conn. 301, 302; Hatheway v. Smith, 79 Conn. 506.

In Cornwall v. Todd, 38 Conn. 443, the question to determine was where the property under the statute was to be taxed. We said on page 446, "Who for the purpose of taxation is to be regarded as the owner of this property? We think we may with propriety say that it belongs to the estate. It does not belong to the executor except in a limited sense, as we have already seen. It does not belong to the heir before distribution; and ordinarily the legatee has no claim until the debts are paid." Inheritance taxes upon the right of the decedent to give or of the beneficiary to receive are conditions which the state may impose upon such right. So the state may penalize the estate for the omission of the decedent to comply with statutes imposing taxes. It may require all such omitted taxes to be paid as a condition of the right of devolution. And it may penalize an estate for the omission of the decedent to pay his taxes. This is not the punishment of the creditors and heirs and legatees for the offense of the decedent; for they have only a beneficial interest in the estate which is always subject to the payment of its debts and obligations. And one of these obligations first in order of fulfillment is that owed to the state in the fulfillment of the duty of the decedent to pay the taxes assessed against him, and also in the payment of such penalties as may be imposed in the nature of a tax upon the estate for
19 the failure of the decedent to fulfill these obligations.

General Statutes Sec. 5007, furnishes an order for the payment of claims, 1, Funeral expenses. 2, Expenses of last sickness, and 3, Taxes due the state and the United States. Penalties of this character fall within class 3, and should be paid in that order.

The tax levied of two per centum per annum on the appraised inventory value of the taxable property of the estate upon which no town or city tax has been assessed or upon which no tax has been paid to the state during the year preceding the date of death of the decedent is exactly the same as if a straight ten per cent penalty has been paid. The proviso that this penalty may be reduced proportionately by proof that for any portion of this period such tax has been paid or that such property was not in the ownership of the decedent is a consideration shown or an exception made in behalf of the estate and indicates that the main purpose of the penalty is to secure the payment of the taxes which the decedent did not pay. But this does not change the character of the penalty. If the representative of the decedent cannot make such proof the estate must pay

the full penalty. Neither the heirs, legatees or creditors pay the penalty but the estate, hence it is not an exaction laid upon persons innocent of the failure to pay this tax and does not deprive them of their property for they never owned the part so paid any more than they could be said to own the part which went to pay accrued taxes. The plaintiffs say this penalty is confiscation of property, but we see in it nothing more than a reasonable regulation to secure the payment of the public taxes.

The civil action for the recovery of a penalty incurred by a decedent may by statutory sanction survive. In effect this statute is a penalty tax imposed upon the estate because of the delinquency of the decedent and no less permissible than the penalty tax against the decedent kept alive by statutory sanction.

(*b*) Sec. 1190, does not create a presumption of guilt of the omission of not listing or paying the tax for the five year period. It imposes a penalty based upon a tax rate for the five year period and it gives the representatives of the estate the privilege of reducing this by proof of the amount of the tax paid or that the decedent did not own the property for any of this period. The extent of the penalty was, within reasonable limits, within the legislative discretion. If the proof be difficult for the representatives to make it is better so than not to have the privilege of making it at all. Had the penalty for the failure to list or pay the tax during the year preceding the date of the death of the decedent been made a flat ten per cent, no question could be successfully made as to the validity of the penalty.

This statute cannot be pronounced so purely arbitrary as to be prohibited by the Fourteenth Amendment. "The Fourteenth Amendment does not prohibit legislation special in character, Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 294. It does not prohibit a state from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal law. Orient Insurance Co. v. Daggs, 172 U. S. 557, 562; Quong Wing v. Kirkendoll, 223, U. S. 59, 62."

The statute is not attacked as unconstitutional because of its classification. Nor could it be. "A legislature is not bound to impose the same rule upon one class of property that it does upon another." Mich. Cent. R. R. Co. v. Powers, 201, U. S. 245, 293, 302. A classification for purposes of the penalty tax of property of an estate which has not borne its share of the general taxes as distinguished from other property which has borne its share of such taxes is not such an arbitrary selection as to be unconstitutional.

The appeal from the determination of the Tax Commissioner to the Superior Court given by General Statutes Sec. 1192, afforded these plaintiffs that due process of law guaranteed by constitution. "It has frequently been held by this court, when asked to review tax proceedings in state courts, that due process of law is afforded litigants if they have an opportunity to question the validity or the amount of an assessment or charge before the amount is determined, or at any subsequent proceedings to enforce its collection, or at any

time before final judgment is entered." Gallup v. Schmidt, 183 U. S. 307.

We have considered and passed upon each of the points discussed in the plaintiffs' brief except their consideration of the case. In re Watson's Estate, (1919) 226 N. Y. 384. We agree with them that that case is not applicable to this case since the tax there in controversy was an inheritance tax while the tax before us is a penalty in the nature of a tax upon the estate.

The learned justice who wrote the opinion in the New York case inadvertently places our estate tax in the same class with the New York and Louisianna transfer taxes, while we construe Par. 1190 of the General Statutes as providing for a penalty.

The Superior Court is advised to sustain the demurrer and to dismiss the application.

No costs to be taxed in this court.
In this opinion the other judges concurred.

The foregoing is a true copy of the original opinions as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

(Signed) JAMES P. ANDREWS,
Reporter,

Per W. E. C.

22 At a Supreme Court of Errors, in the Third Judicial District, Holden at New Haven, on the Third Tuesday of January, 1921.

BANKERS TRUST COMPANY, a Corporation Organized under the Laws of the State of New York and Located in the City of New York, and John McMullen, of Norwalk, Connecticut, as They are the Executors under the Will of Lena McMullen, Late of said Norwalk, Deceased,

vs.

WILLIAM H. BLODGETT, of Hartford, Connecticut, as He is the Tax Commissioner of the State of Connecticut.

On Reservation from the Superior Court.

Judgment.

This reservation presenting questions of law which have arisen in the trial of a case, pending in the trial Court as may appear in the certified transcript of record, stipulation and reservation on file in this Court, was made by the Superior Court, for Fairfield County, on the 23d day of September, 1920, and came to this Court at its session at Bridgeport on the fourth Tuesday of October, 1920; and thence by continuance to the present term, when the parties appeared and were fully heard.

Whereupon it is considered and adjudged that the said Superior

Court be and is hereby advised to render its judgment sustaining the defendant's demurrer to the plaintiffs' application and dismissing said application.

By the Court.

FRED W. TRACY,
Clerk.

Date of Judgment June 1st, 1921.

23 Superior Court, Fairfield County, June 11, 1921.

BANKERS TRUST COMPANY et al., Executors
(Est. of Lena McMullen),

vs.

STATE OF CONNECTICUT.

(Appeal from the Tax Commissioner.)

Motion for Judgment Sustaining Demurrer and Dismissing Appeal.

In the the above entitled cause the Supreme Court of Errors of the State of Connecticut, having sustained the demurrer by the appellee, in accordance therewith the appellee moves that judgment be entered sustaining the demurrer by the appellee and dismissing the application in the nature of an appeal in said cause by the appellants.

WILLIAM H. BLODGETT,
Tax Commissioner.
By CARLOS S. HOLCOMB,
His Attorney.

At a Superior Court Holden at Bridgeport, Within and for Fairfield County, on the 23rd day of June, 1921.

Present, Hon. John P. Kellogg, Judge.

Superior Court, Fairfield County, June 23, 1921.

BANKERS TRUST COMPANY et al., Executors
(Est. of Lena McMullen),

vs.

STATE OF CONNECTICUT.

(Appeal from the Tax Commissioner.)

Judgment.

Whereas the above entitled cause came to this Court on the first Tuesday of June 1920 by an application in the nature of an appeal

from the Tax Commissioner in the assessment of a tax amounting to $10,286.39 upon the Estate of Lena McMullen, under the provisions of Sections 1189 to 1195, both inclusive, of the General Statutes assigning reasons of appeal to which the appellee demurred and thereupon the cause was reserved for the advice of the Supreme Court of Errors for the State of Connecticut, and whereas the said Supreme Court of Errors has directed that said demurrer be sustained and that judgment be entered dismissing said application in the nature of an appeal from the Tax Commissioner, all as on file.

Now therefore it is hereby adjudged that said demurrer be, and hereby is, sustained and said application in the nature of an appeal is hereby dismissed.

By Order of the Court,

MICHAEL J. FLANAGAN,
Asst. Clerk.

Superior Court of the State of Connecticut, County of Fairfield.

I, Fred W. Tracy, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to 24 inclusive, are a true, full and complete transcript of the record and proceedings in #14623, the Bankers Trust Company and John McMullen, Executors of the Estate of Lena McMullen, vs. Wm. H. Blodgett, Tax Commissioner of the State of Connecticut, as the same now appear on file in my office.

In witness whereof, I have hereunto set my hand and the seal of said Court at my office in Bridgeport in said County and State this 16th day of August, 1921.

[Seal of the Superior Court, Fairfield County, Conn.]

FRED W. TRACY,
Clerk.

Superior Court, State of Connecticut, Fairfield County, July 29th, 1921.

BANKERS TRUST COMPANY and JOHN MCMULLEN, Executors of the Estate of Lena McMullen,

vs.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut.

Petition for Writ of Error.

To the Honorable George W. Wheeler, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut:

The Bankers Trust Company and John McMullen, Executors, the plaintiffs in the above entitled cause, show by this petition to this

Honorable Court that in the records, proceedings and decision in the Superior Court, Fairfield County, following the advice and opinion of the Supreme Court of Errors of the State of Connecticut, the same being the hig-est Court of said state in which a decision could be had in this suit, a manifest error has occurred greatly to the damage of The Bankers Trust Company and John McMullen, Executors.

That as appears in the record and proceedings there was involved in question the following:

1. Whether or not under said pleadings and in respect to The Bankers Trust Company and John McMullen, Executors, Sections 1190 of the General Statutes of Connecticut, Revision of 1918 and Chapter 50 of the Public Acts of 1919 of the State of Connecticut, are in violation of the provisions of the Constitution of the United States in that they impose a penalty without due process of law, contrary to the Fourteenth Amendment to said Constitution of the United States.

26 2. Whether or not Chapter 50 of the Public Acts of 1919 of the State of Connecticut and Section 1190 of the General Statutes of Connecticut, Revision of 1918, are in violation of the provisions of the Constitution of the United States in that they create a presumption of guilt and deprive the plaintiffs of due process of law, contrary to the Fourteenth Amendment to said Constitution of the United States.

3. Whether or not Section 1190 of the General Statutes of Connecticut, Revision of 1918, is in violation of the provisions of the Constitution of the United States in that it constitutes an ex post facto law contrary to Section 10 of Article 1 of said Constitution of the United States.

All of which fully appears in the records and proceedings of the case as specifically set forth in the assignment of errors filed herewith.

Wherefore your petitioner prays that a writ of error be allowed and that a transcript of the record, proceedings and papers upon which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of such Court in such cases made and provided.

THE BANKERS TRUST COMPANY AND
JOHN McMULLEN,
Executors,
By DANIEL DAVENPORT,
PULLMAN & COMLEY,
Their Attorneys.

27 Superior Court, State of Connecticut, Fairfield County, July 29th, 1921.

BANKERS TRUST COMPANY and JOHN McMULLEN, Executors,

vs.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut.

Assignment of Errors.

Now come the Bankers Trust Company and John McMullen, executors, the plaintiffs in the above-entitled action and file herewith their petition for a writ of error and say there are errors in the records and proceedings of the above-entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States make the following assignment:

1. The court erred in holding that the provisions of Section 1190 of the General Statutes of Connecticut, Revision of 1918 and Chapter 50 of the Public Acts of 1919 of the State of Connecticut are not in conflict with and in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for that the State of Connecticut by and through the provisions of said Statutes assumes and seeks:

(*a*) To deprive the plaintiffs in error and to deprive those whom the plaintiffs in error represent as executors of property without due process of law by imposing a penalty upon said plaintiffs in error and upon those whom said plaintiffs in error represent for an omission of which said plaintiffs in error and those whom said plaintiffs in error represent are innocent;

(*b*) To deprive the plaintiffs in error and those whom
28 the plaintiffs in error represent as executors of property without due process of law by creating a presumption of guilt of the omission for which said penalty is imposed;

2. The court erred in holding that the provisions of Section 1190 of the General Statutes of Connecticut, Revision of 1918, are not in conflict with and in violation of the provisions of Section 10 of Article 1 of the Constitution of the United States for that the provisions of said statute constitute an ex post facto law.

For which errors the said plaintiffs in error, The Bankers Trust Company and John McMullen, Executors, pray that the judgment of said Superior Court, dated June 23rd, 1921, be reversed and judgment entered for the plaintiffs in error and for costs.

THE BANKERS TRUST COMPANY AND
JOHN McMULLEN, *Executors.*
By DANIEL DAVENPORT,
PULLMAN & COMLEY,
Their Attorneys.

) Superior Court, State of Connecticut, Fairfield County, July 29th, 1921.

BANKERS TRUST COMPANY and JOHN MCMULLEN, Executors,

vs.

ILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut.

efore the Honorable George W. Wheeler, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut.

Order of Allowance of Writ of Error.

On this 29th day of July 1921 the application of The Bankers rust Company and John McMullen, Executors, plaintiffs in the ove entitled action, for a writ of error came on to be heard, said aintiffs being represented by counsel and it appearing to the court om the petition filed herein, and from the record filed therewith, at their application should be granted and that a transcript of e record, proceedings and papers upon which the judgment of e court was rendered properly certified should be sent to the Su- eme Court of the United States, as prayed, in order that such oceedings may be had as may be just.

Now therefore

It is ordered that a writ of error be allowed, bond having been rnished by the plaintiffs, conditioned according to law, in the sum $500, and that a true copy of the record, assignment of errors, d all proceedings in the case in the Superior Court of the State Connecticut shall be transmitted to the Supreme Court of the nited States, duly certified according to law, in order that said court may inspect the same and take such action thereon as it deems proper according to law.

GEORGE W. WHEELER.
Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court for the State of Connecticut.

Know all — by these presents:

That the Bankers Trust Company and John McMullen as prin- als, and the National Surety Company of New York and having sual place of business in Bridgeport, Conn., as surety, are held d firmly bound unto William H. Blodgett, Tax Commissioner the State of Connecticut, in the sum of Five Hundred Dollars 500.00) to be paid to the said William H. Blodgett, Tax Commis- ner of the State of Connecticut, to which payment well and truly

to be made we bind ourselves jointly and severally by these Presents. Sealed with our seals and dated this 29th day of July 1921.

Attest:
[SEAL.] BANKERS TRUST CO.,
By A. A. TILNEY,
Vice President.

C. C. PRICE,
Asst. Trust Officer.

NATIONAL SURETY CO., [SEAL.]
By D. FAIRCHILD WHEELER,
Attorney in Fact.

H. M. LYON,
As to D. F. A.

Whereas the above named plaintiffs in error, the said Bankers Trust Company and the said John McMullen, have sued out a writ of error from the United States Supreme Court to the Superior Court of the State of Connecticut to reverse the Judgment of the Superior Court of the State of Connecticut rendered on the 23rd day of June 1921 in the suit of Bankers Trust Company and John McMullen, Executors vs. William H. Blodgett, Tax Commissioner of the State of Connecticut.

Now therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages that may be
32 adjudged if they shall fail to make good their plea, then this obligation is to be void, otherwise to remain in full force and effect.

____ ____.
____ ____.
BANKERS TRUST CO.,
By A. A. TILNEY,
Vice President.

Attest:
[SEAL.] C. C. PRICE,
Asst. Trust Officer.

Approved this 29th day of July, 1921.

GEORGE W. WHEELER,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

I hereby certify that the foregoing is a true and exact copy of the original bond as filed with me.

[Seal of Superior Court, Fairfield County, Conn.]

FRED W. TRACY,
Clerk of the Superior Court for the State of Connecticut for Fairfield County.

33 Superior Court, State of Connecticut, Fairfield County, August 15, 1921.

BANKERS TRUST COMPANY and JOHN MCMULLEN, Executors,

vs.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Superior Court of the State of Connecticut, Greeting:

Because in the record and pleadings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, following the advice and opinion of the Supreme Court of Errors of the State of Connecticut, the same being the highest court of law or equity of said State, in which a decision could be had in the said suit between The Bankers Trust Company and John McMullen, Executors, and the State of Connecticut, wherein was drawn in question the validity of a treaty or statute of, or authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaty or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of said
34 The Bankers Trust Company and John McMullen, Executors as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court of the United States at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft Chief Justice of the United States, this 15th day of August in the Year of our Lord One thousand nine hundred and twenty-one.

C. E. PICKETT.
Clerk of the District Court of the United States, District of Connecticut.

Allowed, Aug. 15, 1921.

GEORGE W. WHEELER,
Chief Justice Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut.

Filed Aug. 16, 1921.

FRED W. TRACY,
Clerk.

35 Superior Court, State of Connecticut, Fairfield County, August 16th, 1921.

BANKERS TRUST COMPANY and JOHN MCMULLEN, Executors,

vs.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut.

I, Fred W. Tracy, Clerk of said Court do hereby certify that there was lodged with me as such Clerk on August 16th 1921, in No. 14623, the Bankers Trust Company and John McMullen, Executors, vs. William H. Blodgett, Tax Commissioner of the State of Connecticut;

1. The original bond, of which a copy is herein set forth.

2. A copy of the writ of error, as herein set forth, to file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at my office in Bridgeport, in said County and State, this 16th day of August 1921.

[Seal of the Superior Court, Fairfield County, Conn.]

FRED W. TRACY,
Clerk.

36 UNITED STATES OF AMERICA, *ss:*

To William H. Blodgett, Tax Commissioner of the State of Connecticut, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Superior Court for Fairfield County, State of Connecticut, wherein The Bankers Trust Company and John McMullen, Executors, are plaintiffs in error and William H. Blodgett, Tax Commissioner of the State of Connecticut, is defendant in error.

to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Wheeler, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut, this 15th day of Aug. in the Year of Our Lord One thousand nine hundred and twenty-one.

GEORGE W. WHEELER,
Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut.

37 Superior Court, State of Connecticut, Fairfield County, August 24th, 1921.

BANKERS TRUST COMPANY and JOHN MCMULLEN, Executors,

vs.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut.

Hartford, Conn., August 24th, 1921.

We, attorneys of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

——— ———,
——— ———,

HUGH M. ALCORN,
Attorneys for the Defendant in Error.

38 Superior Court, State of Connecticut, Fairfield County, August 16th, 1921.

BANKERS TRUST COMPANY and JOHN MCMULLEN, Executors,

vs.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut.

Superior Court, State of Connecticut, Fairfield County, August 16th, 1921.

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case together with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said Superior Court at Bridgeport, in said County and State this 16th day of August 1921.

[Seal of Superior Court, Fairfield County, Conn.]

FRED W. TRACY,
Clerk.

Endorsed on cover: File No. 28,479. Connecticut Superior Court. Term No. 524. Bankers Trust Company and John McMullen, Executors of the estate of Lena McMullen, deceased, plaintiffs in error, vs. William H. Blodgett, tax commissioner of the State of Connecticut. Filed September 10th, 1921. File No. 28,479.

SEP
WM. R.

No. [redacted] 169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

BANKERS TRUST COMPANY, *et al.*, EXECUTORS,
Plaintiffs-in-error,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER
OF THE STATE OF CONNECTICUT,
Defendant-in-error.

In Error to the Superior Court of the State of Connecticut:

BRIEF FOR PLAINTIFFS-IN-ERROR.

WILLIAM H. COMLEY
Attorney for Plaintiffs-in-error.

INDEX OF POINTS.

	PAGES
Statement of the Case	1
Specification of Errors	4
The Proposition	5
Brief of the Argument	5

POINT I

These Statutes violate the Fourteenth Amendment to the Constitution of the United States because they penalize the creditors and heirs for an omission of the decedent 5

A. The tax imposed by Section 1190 cannot be sustained as a succession tax 6
B. The tax imposed by Section 1190 is in the nature of a penalty 10
C. The case of In Re Watson's Estate considered 15
D. Since the liability imposed by Section 1190 is not in the nature of a succession tax, it violates the Fourteenth Amendment to the Constitution of the United States in that it purports to authorize a deprivation of property without due process of law by the exaction of a penalty from persons innocent of the omission for which it is exacted 16

POINT II

Chapter 50 and Section 1190 violate the due process clause of the Fourteenth Amendment to the Constitution of the United States because, in imposing a pen-

PAGES

alty, they create a presumption of guilt of the omission for which the penalty is imposed 26

POINT III

Section 1190 is void as an ex post facto law 39
Conclusion 40

APPENDIX.

General Statutes, Conn. Rev. 1918.

Section 1138—Tax Lists, When To Be Given In 41
Section 1188—Payment to State Treasurer of Taxes on Choses In Action 41
Section 1191—Tax Commissioner to Notify State Treasurer and Court of Probate When any Tax is Due 42
Section 1192—Appeal from Decision of Tax Commissioner Allowed 43
Section 1193—Collection of Tax by State Treasurer 44

TABLE OF CASES CITED.

Anderson *v.* Ritterbusch, 22 Okla. 761, 98 Pac. 1002 40
Bailey *v.* Alabama, 219 U. S. 219, 55 L. Ed. 191 29
Bankers Trust Co. *v.* Blodgett, 96 Conn. 361, 114 Atl. 104 ..... 10, 16
Banks *v.* Georgia, 124 Ga. 15, 52 S. E. 74 .. 30
Black *v.* State, 81 So. 411 30
Boyd *v.* United States, 116 U. S. 616, 29 L. Ed. 746 32
Bridgeport *v.* Hubbell, 5 Conn. 237 39

PAGES

Buckingham's Appeal, 60 Conn. 143, 22 Atl. 509 18
Commonwealth *v.* Anselvitch, 186 Mass. 376, 71 N. E. 790 31
Commonwealth *v.* Minor, 88 Ky. 422, 11 S. W. 472 28
Commonwealth *v.* Standard Oil Co., 101 Pa. St. 119 12
Corbin *v.* Baldwin, 92 Conn. 99, 100 Atl. 834 7
Cornwall *v.* Todd, 38 Conn. 443 ..... 22, 23
Cummings *v.* Missouri, 4 Wall. 277, 18 L. Ed. 356 31
Ex parte Woodward, 181 Ala. 97, 61 So. 295 30
Fontenot *v.* Accordo, 278 Fed. 871 14
Gager *v.* Prout, 48 Oh. St. 89, 26 N. E. 1013 40
Griffin *v.* State, 142 Ga. 636, 83 S. E. 540 ... 30
Hall *v.* Norfolk and Western R. R. Co., 44 W. Va. 36, 28 S. E. 754 32
Hawes *v.* State, 103 S. E. 170 30
Helwig *v.* United States, 188 U. S. 605 14
Hopkins Appeal, 77 Conn. 644, 60 Atl. 657 8
In re Kollock, 165 U. S. 526, 536 14
In re Estate of Isaac Minor, 180 Pac. 813 .. 28
In re Watson, 226 N. Y. 384, 123 N. E. 758 15
In re Wong Hane, 108 Cal. 680, 41 Pac. 492 29
Jefferson *v.* Fink, 247 U. S. 288, 62 L. Ed. 1117 25
Johnson *v.* Connecticut Bank, 21 Conn. 148 18
Knowlton *v.* Moore, 178 U. S. 41, 44 L. Ed. 969 7
List *v.* Miner, 74 Conn. 50, 49 Atl. 856 32
Louisville & Nashville R. R. Co. *v.* R. R. Commissioners of Tennessee, 19 Fed. 679 29
Louisville School Board *v.* King, 127 Ky. 824, 107 S. W. 247 32

PAGES

Marshall *v.* McDaniel, 12 Bush 378 36
McFarland *v.* American Sugar Refining Co. 241, U. S. 79, 60 L. Ed. 899 28
McMillen *v.* Anderson, 95 U. S. 37 32
Merchants Bank of New Haven *v.* Bliss, 13 Abb. Prac. 225, 21 How. Prac. 365 12
Middleton *v.* Mee, 277 Fed. 492, 501 36
Nettleton's Appeal, 76 Conn. 235, 56 Atl. 565 6
New Jersey *v.* Anderson, 203 U. S. 492 14
New London *v.* Miller, 60 Conn. 112 14
Opinion of the Justices, 208 Mass. 619, 94 N. E. 1044 29
Pardee *v.* Smith, 27 Mich. 33 32
People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759 31
People *v.* McBride, 234 Ill. 146, 84 N. E. 865 30
People ex rel. Ferguson *v.* Reardon, 197 N. Y. 236, 90 N. E. 829 34
People ex rel. Woronoff *v.* Mallon, 222 N. Y. 456, 119 N. E. 102 30
State *v.* Beach, 147 Ind. 74, 46 N. E. 145 ... 31
State *v.* Cunningham, 25 Conn. 195 30
State *v.* Hoyt, 47 Conn. 518 39
State *v.* Morgan, 40 Conn. 44 30
State *v.* Travelers Ins. Co., 73 Conn. 255, 47 Atl. 299 17
United States *v.* Perkins, 163 U. S. 625, 41 L. Ed. 287 7
Ward *v.* Ives, 91 Conn. 12, 98 Atl. 337 18
Watson *v.* State Comptroller, 254 U. S. 122, 65 L. Ed. 170 15
Wynehamer *v.* People, 13 N. Y. 378 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

BANKERS TRUST COMPANY, *et al.*,
Plaintiffs in error,
vs.
STATE OF CONNECTICUT,
Defendant-in-error.

No. 524

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF CONNECTICUT.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

This is a writ of error to review a judgment of the Supreme Court of Errors of the State of Connecticut in favor of the defendant (defendant in error here) sustaining a so-called penalty tax levied upon the estate of Lena McMullen represented by the plaintiffs (plaintiffs in error here).

Lena McMullen died testate at Norwalk, Connecticut, on the twentieth day of May, 1919, possessed of an estate which has been valued at $264,237.46. After their due qualification as executors, the plaintiffs filed with the inventory of the estate an affidavit as required by Chapter

50 of the Public Acts of 1919. That chapter reads as follows:

"Section 1189 of the General Statutes is amended to read as follows:

The executor of every will and the administrator of every estate, except as hereinafter provided, at the time of filing the inventory and appraisal of such estate with the Court of Probate, shall, in addition thereto, file an affidavit in duplicate setting forth the items included in such inventory on which a tax has been assessed by any town or city during the last completed taxing period or paid to the State during the year next preceding the date of the death of the decedent, the assessed value of each item and the place of assessment or payment of the tax on each item, and the Judge of Probate shall send to the Tax Commissioner, with the copy of each inventory required to be sent to said Commissioner, a copy of such affidavit. Each Judge of Probate, in addition to the copies of other inventories required to be filed with the Tax Commissioner shall file with said Commissioner a copy of the inventory and appraisal of each estate in process of settlement in his Court less than one thousand dollars in value, which includes taxable property upon which no town or city tax has been assessed during the last completed taxing period, or upon which no State tax has been paid during the year next preceding the date of the death of the decedent. The term 'complete taxing period,' as herein used, means the time allowed for the Assessors and Board of Relief to complete their duties. Any estate the appraised value of which is not in excess of two thousand dollars and any portion of which passes, by will or pursuant to the provisions of the Statutes of this State relating to the distribution of intestate estates, to the widow or minor children, shall be exempt

from the provisions of this section and Section 1190 of the General Statutes."

The affidavit, filed by the plaintiffs, averred that all taxes upon the decedent's realty had been paid but it omitted to aver that taxes due upon certain stocks, bonds, notes, books accounts, and tangible personalty had been paid. This omission was followed by a statement from the Tax Commissioner that, by the terms of Section 1190 of the General Statutes, the estate was liable to a penalty tax of $10,286.39. Section 1190 reads as follows:

> "Rate of Tax on Property on Which No State or Municipal Tax Was Paid in Preceding Year. All Taxable property of any estate upon which no town or city tax has been assessed as provided in Section 1189 or upon which no tax has been paid to the State during the year preceding the date of the death of the decedent, shall be liable to a tax of two per centum per annum on the appraised inventory value of such property for the five years next preceding the date of the death of such decedent, provided, the executor or administrator of any estate may, by furnishing evidence to the satisfaction of the Tax Commissioner that a state, town or city tax has been paid on any of such property for a portion of said five years or that the ownership of such property has not been in the decedent for a portion of said period, obtain a proportionate reduction from the tax hereby imposed, and, provided, the administrator or executor of such estate may furnish evidence to the Tax Commissioner that the appraised value of the estate is not in excess of two thousand dollars and a portion of the same passes by will or pursuant to the provisions of the statutes relating to the distribution of intes'ate estates, to the widow or minor children, as provided in Section 1189."

The plaintiff then made an application in the nature of an appeal to the Superior Court in accordance with Section 1192 of the General Statutes, praying that the tax be declared illegal on the ground that the statutes authorizing the assessment thereof were unconstitutional. The defendant filed a demurrer to this application.

SPECIFICATION OF ERRORS.

1. The Court erred in holding that the provisions of Section 1190 of the General Statutes of Connecticut, Revision of 1918 and Chapter 50 of the Public Acts of 1919 of the State of Connecticut are not in conflict with and in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the State of Connecticut by the provisions of said Statutes assumes and seeks:

> (a) To deprive plaintiffs in error and to deprive those whom the plaintiffs in error represent as executors of property without due process of law by imposing a penalty upon said plaintiffs in error and upon those whom said plaintiffs in error represent for an omission of which said plaintiffs in error and those whom said plaintiffs in error represent are innocent;
>
> (b) To deprive plaintiffs in error and those whom they represent of property without due process of law by creating a presumption of guilt of the omission for which said penalty is imposed.

2. The Court erred in holding that the provisions of Section 1190 of the General Statutes of Connecticut, Revision of 1918, are not in conflict

with and in violation of the provisions of Section 10 of Article 1 of the Constitution of the United States for that the provisions of said Statute constitute an ex post facto law.

THE PROPOSITION.

The plaintiffs' appeal raises only one proposition—that the statutes which authorize the assessment of this tax are unconstitutional. The plaintiffs raise no question as to the amount of the tax. They admit that if the defendant has the power to make the assessment, he has exercised that power according to law. They deny the power.

BRIEF OF THE ARGUMENT.

1. These statutes violate the Fourteenth Amendment to the Constitution of the United States because they penalize the creditors and heirs for an omission of the decedent.

A. The tax imposed by Section 1190 is not an inheritance or succession tax.

B. The tax imposed by Section 1190 is in the nature of a penalty.

C. The Case of In Re Watson's Estate considered.

D. Since the liability imposed by Section 1190 is not in the nature of a succession tax, it violates the Fourteenth Amendment to the Constitution of the United States in that it purports to authorize a deprivation of property without due process of law by the exac-

tion of a penalty from persons innocent of the omission for which it is exacted.

2. The Statutes violate the due process clause of the Fourteenth Amendment to the Constitution of the United States because, in imposing a penalty, they create a presumption of guilt of the omission for which the penalty is imposed.

3. Section 1190 is void as an ex post facto law.

1-A.

The Tax imposed by Section 1190 cannot be sustained as a Succession Tax.

At first glance, this tax appears to be in the nature of an inheritance or succession tax and the hasty conclusion may be drawn that it may be upheld upon the grounds sustaining such taxes. But a further examination reveals an entire absence of relationship between the two. In fact, the only point of similarity is the moment of time at which they are assessed—the moment of death.

By decisions in almost every state, it is settled that, because the flow of property from the dead to the living is not a natural right but a privilege conferred by the state, the state, being as it were, the source, is in a position to regulate that flow. It is said in

> *Nettleton's Appeal* (1903) 76 Conn. 235, 242, 56 Atl. 565, 567.

> "Inasmuch as the process by which the State assumes the care of property upon the death of its owner and secures its distribution to the objects designated by him in his will

> or to the persons designated by the law of intestacy, is the creature of statute which the State may alter or abrogate at pleasure, therefore the power of its owner to so transfer property through his death, and of his legatee or the distributee of his estate to so receive the property is a privilege granted by the State which may properly dictate the terms on which the privilege may be enjoyed."

In accordance with the reasoning set forth in the above extract it is universally held that a succession tax is not a direct tax upon property but a tax upon the privilege of inheritance. It is said in

> *Knowlton* v. *Moore* (1900) 178 U. S. 41, 56, 44 L. Ed. 969, 975.

> "Although different modes of assessing such duties prevail and although they have different accidental names such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless the laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit or the transmission from the dead to the living on which such taxes are more immediately rested."

> *Corbin* v. *Baldwin* (1917) 92 Conn. 99, 101 Atl. 834.
> See also *United States* v. *Perkins* (1896) 163 U. S. 625 41 L. Ed. 287.

Since a succession tax is a tax upon the privilege of receiving or transmitting property through death, it follows that there must be some property

received or transmitted. There can be no tax upon the privilege of inheritance unless there is something inherited. Therefore, it is a fundamental characteristic of all inheritance taxes that it is only the difference between the gross value of the estate and the indebtedness of the estate that is taxable, for it is only that portion of the estate—the net value—that passes from the decedent to his beneficiaries. It is only that portion of the estate which is affected by the state-given privilege of succession which, admittedly, the State may regulate. It is said in

> *Hopkin's Appeal* (1905) 77 Conn. 644, 653, 60 Atl. 657, 661,
>
> "And our succession tax is computed with reference to the whole beneficial interest which passes by force of our laws."

And in the same case at page 651,

> "The duty is not imposed unless the succession involves some beneficial succession."

The tax imposed by Section 1190 is not upon that portion of the estate which passes by virtue of the laws of inheritance. It is upon the gross value of certain designated portions of the estate even though they may never pass to any object of inheritance because of the claims of creditors. A simple case will illustrate. Suppose the gross value of an estate to be $100,000 upon which no taxes had been paid for five years prior to the death of the decedent. Suppose the debts to be $90,000. The whole estate would be consumed in the payment of the debts and of the penalty tax which would amount to $10,000. Nothing would pass from the decedent. Nothing would pass to

the heirs. Can the State be said, in such a case, to be regulating the privilege of succession? Before any opportunity is given to determine the value of the inheritable portion of the estate, the taxing power acts. And this tax would operate upon the same principle even though the indebtedness of the same estate were but one dollar and even though the amount of the tax were equally small.

This aspect of the tax alone stamps it as something far different from a succession tax. But it is also to be noted that none of the customary classifications of inheritance taxes are provided for. Widows and children feel the extreme severity of its operation as much as distant kindred or total strangers, unless the gross value of the estate is less than the pitifully small sum of $2,000.

The position of the tax in the General Statutes indicates its character. It is not included in Chapter 66 which is entitled "Succession Tax," but it is placed in Chapter 65 which is entitled "Assessment," and it bears this significant caption: "Rate of Tax on property on which no state or municipal tax was paid in preceding year."

The Supreme Court of Errors of the State of Connecticut adopts this construction of the Statute. In the opinion of Chief Justice Wheeler the following appears: (Record p. 11)

> "This tax may or it may not represent what the decedent would have been required to pay had he paid the state or local tax. The entire five years' tax may be compelled when in fact nothing over one year is due but the representative of the decedent cannot prove the fact. The State presumes it is unpaid for the five year period and requires the executor or

> administrator to disprove this. This is not the compulsory payment of a defined tax but is the infliction of a punishment for a violation of a public duty. The authors of this Statute intended it as and for a penalty tax and such we esteem it to be."
>
> *Bankers Trust Co.* v. *Blodgett*, 96 Conn. 361.

And in another part of the opinion (Record p. 10) it is said:

> "The wrong sought to be redressed by this tax is a wrong which has been done to the public treasury. The necessities of government give the state the right to tax property for such purposes and in such amounts as it may determine, subject only to such restrictions as may be imposed by the Constitution, and with the power to enforce collection of the tax by all summary means not contrary to the Constitution and one of these means is the right to impose penalties in order to compel payment and as a punishment for evasion or neglect of this duty owed the public."

1-B.

The Tax imposed by Section 1190 is in the nature of a penalty.

The wording of Section 1190 is broad enough to include all kinds of property, both real and personal. But it is a matter of common knowledge that the prime purpose and the chief effect of the statute is to obtain an exaction from personalty and especially from that kind of personalty known as choses in action, including bonds, stocks, notes, etc. And it is safe to say that the greater

portion of the revenue derived from this tax comes from property of this type and that a proportionately negligible amount comes from property of a tangible character.

Choses in action may be listed in the town where the owner resides and taxed at the town rate, or, by the terms of Section 1188 (see appendix) of the General Statutes, they may be listed in the office of the State Treasurer and taxed at the rate of four mills per year for five years or any part thereof. Then comes Section 1190 which imposes a tax of twenty mills per year for a period of five years, provided the property is subject to the full tax. Where the decedent could have fully performed his duty to the State by the payment of two per cent. of the value of his property, the innocent creditors and beneficiaries of his estate are compelled to submit to an exaction of ten per cent. of that value. That exaction contains the very element of a penalty—a punishment for an omission to perform a duty. It may be argued that there can be no presumption that the decedent would have listed his property with the State and thus avoided the payment of the higher town rate. And it may well be that if the penalty were exacted from the decedent himself, no such presumption in his favor should be indulged in because the responsibility for his own conduct rests with him. But when it is remembered that the force of this penalty falls upon innocent parties who have no connection with the omission for which it is imposed, it would seem only proper to presume that, had the decedent seen fit to pay his taxes, he would have paid them in the way that would have caused him and his creditors and his heirs the least expense.

The penal quality of a statute does not depend

upon the wording thereof but upon its substance and the effect of its operation. It is said in

Merchants Bank of New Haven v. *Bliss* (1861) 13 Abb. Prac. 225, 21 How. Prac. 365.

"To determine whether a liability to which a person is subjected is by way of penalty or forfeiture, it is not necessary that the statute, in the language imposing it, should denominate it a penalty or forfeiture. When the statute subjects an officer of a company, as such officer, to a liability to pay money, either for omitting to perform a duty enjoined, or for doing an act prohibited, and does this in a case where, but for such omission of duty or wrongful act, he would be under no liability, he is thereby subjected to a forfeiture of the sum which he is made liable to pay and, so far as he is concerned, the imposition of liability is by way of punishment."

See Endlich, Interpretation of Statutes (1888) Sec. 331.

Commonwealth v. *Standard Oil Company* (1882) 101 Pa. St. 119,

where it was held that the charging of twelve per cent. interest upon taxes is in substance a penalty for the omission to perform a duty.

The almost daily contact between the members of the Bar and the operation of this statute has resulted in the striking off of a phrase which clearly indicates the light in which the tax appears to them. Everywhere it is referred to in this descriptive phrase—PENALTY TAX. The taxing authorities themselves so denominate it. The printed notice in which executors and administra-

tors are apprised of the amount of the tax contains this heading: "Subject: Estate Penalty Tax" and also this line: "Note—This tax has no connection with the Succession or Inheritance Tax on said estate but is in addition thereto." The general legal intelligence of the State has, in that phrase, found the true nature of this tax. And to say that it is a penalty tax is to say that it is a penalty. The addition of the word tax in no way qualifies its penal character. Where, because in default of the payment of a certain sum, a sum five times as large is exacted, that exaction is a penalty and its real character cannot be concealed behind a word.

We respectfully submit that the Tax Commissioner (defendant in error) finds himself in this position that he must, in order to justify this relatively heavy exaction, rest it upon the doctrine of wrong doing and punishment; therefore, he calls it a penalty. But straightway he is met with the criticism (1) that this punishment falls not upon the offender but upon innocent parties (2) that it is incurred not on account of the guilt of the deceased, but the inability of his estate to prove his innocence; and (3) in respect to this plaintiff it punishes the estate for an offense presumed to have been committed before the act was passed. Therefore, in order to give this somewhat drastic punishment a semblance of due process, the Tax Commissioner calls the exaction a "penalty tax." It is so called in the opinion of the Connecticut Supreme Court.

But if it is a penalty it is not a tax. If it is a tax it is not a penalty.

A tax has been defined as follows:

"The regular, uniform and equal contribu-

tions which all citizens are required to make for the support of the government."

New London v. *Miller* 60 Conn. 112, 116.
New Jersey v. *Anderson* 203 U. S. 492.

The definitions are varied as to form. But through all the discussion runs the ever present idea that taxation is the means by which a government sustains itself. Property may be taxed, occupations may be taxed, privileges, franchises, transfers, successions, etc.

But who ever heard of a civilized government that sought to derive a revenue by imposing a tax on the commission of a wrong. Permitted acts may be taxed. Forbidden things are penalized, not taxed.

In re Kollock 165 U. S. 526, 536.

If the essence of taxation is revenue, obviously it would not be said that the purpose of a tax upon an act was to discourage that act.

May it not with fairness be said that if the exaction in question may be called a tax it is levied as a tax upon the privilege of tax-dodging; and the greater the amount of tax-dodging the greater will be the revenues of the state.

As a mere designation the words "penalty tax" may furnish a convenient name. They identify the statutes and the procedure involved. But if this exaction is a penalty "as a punishment for evasion or neglect," and as a penalty it takes away property without due process of law, it cannot be validated by calling it a "penalty tax."

Fontenot v. *Accordo* 278 Fed. 871.
Helwig v. *United States* 188 U. S. 605.

1-C.

The case of *Watson* v. *State Comptroller,* 254 U. S. 122, reviewed the case of In re: Watson, 226 N. Y. 384.

This case dealt with a tax upon the privilege of succession by inheritance or devise.

It held that, as against one who enjoyed that privilege, a classification of property for the purpose of taxation which distinguished between property which had during decedent's life borne its fair share of the tax burden and that which had not was reasonable.

> *Watson* v. *State Comptroller,* 254 U. S. 122.

But in closing the opinion in that case, Mr. Justice Brandeis spoke as follows:

> "Whether this additional transfer tax would be obnoxious to the 14th Amendment if it could be deemed a property tax or a penalty, we have no occasion to consider."

In view of the decision of the Supreme Court of Connecticut, it will be assumed with respect to the Connecticut statute now in question

(1) That it is not a succession tax.
(2) That it imposes a penalty.
(3) That the justification for this statute rests not upon the legal principles which define and limit the power to tax, but upon the power of the state to "enforce collection of the tax by all summary means not contrary to the Constitution," one of which means "is the right to impose penalties."

It is apparent that the State of Connecticut, aside from the statute in question, has exercised

to the limits of its own policy, the power to tax property within its borders. The purpose of the statute in question would be best served if it yielded no revenue at all. It will have achieved its end only when the effect of its drastic punishment is to induce all property owners to fulfill their obligation to the State in the matter of listing their property for taxation. Such is the end and purpose of all punishment.

We call the Court's attention to the conclusion reached by the Supreme Court of Connecticut as to the applicability of the case of in re Watson.

> "We have considered and passed upon each of the points discussed in the plaintiffs' brief except their consideration of the matter of Watson (1919) 226 N. Y. 384, 123 N. E. 758 (*Watson* v. *State Comptroller*, 254 U. S. 122, 41 Sup. Ct. 43). We agree with them that that case is not applicable to this case since the tax there in controversy was an inheritance tax while the tax before us is a penalty in the nature of a tax upon the estate. The learned justice who wrote the opinion in the New York case inadvertently places our estate tax in the same class with the New York and Louisiana transfer taxes, while we construe Par. 1190 of the General Statutes as providing for a penalty."
>
> *Bankers Trust Co.* v. *Blodgett*, 96 Conn. 361, 372.

1-D.

Since the liability imposed by Section 1190 is not in the nature of a succession tax, it violates the Fourteenth Amendment of the United States in that it purports to authorize a depriv-

ation of property without due process of law by the exaction of a penalty from persons innocent of the omission for which it is exacted.

Starting with the proposition that taxation upon the property of estates of deceased persons is subject to the same limitations as taxation upon other property, the conclusion is irresistible that this penalty violates the Fourteenth Amendment. It is true that the power of the State of Connecticut to tax is subject to no special restrictions but it is equally certain that it is subject to all the restrictions which the fundamental law places upon all legislation. It is said in

State v. *Travelers Insurance Co.* (1900) 73 Conn. 255, 265, 47 Atl. 299, 302.

> "Is it so, then, that the Legislature may make any exaction it pleases under the form of a tax? Clearly not. The legislative power in all its manifestations is limited, including that of taxing, which, however, from its inherent nature, approaches more clearly to arbitrary power. If a tax is laid on the exercise of the duty of voting, or if any exaction is put in the form of taxation as a mere sham and is in effect and purpose a denial to one of the enjoyment of rights indicated in the Constitution and the enjoyment of which it secures equally to all, or is a seizure of the property of one for the benefit of another, or is an uncompensated confiscation of property, the law authorizing such exactions is in violation of mandates contained in our Constitution, and probably in all American constitutions, and is therefore void. It is neither taxation nor legislation."

The penalty violates the Fourteenth Amendment because it punishes the creditors and heirs

for the omission of the decedent. At the time the penalty is laid, the guilty party is dead. At no time during his life was he personally liable for the penalty. At no time during his life was any of his property subject to this penalty. It constitutes no debt, no lien which outlives him. Upon his death, the entire legal and beneficial ownership of his property passes away from him. No penalty accrues until he has become incapable of owning or being owned. At that juncture, the State assumes the custody of his property for purposes of convenience and policy. But no title, legal or equitable, passes to the State. Complete title to his realty vests immediately in his heirs or devisees. Legal title to his personalty vests in his personal representative in trust for creditors, legatees, and distributees.

Ward v. *Ives* (1916) 91 Conn. 12, 98 Atl. 337.

Johnson v. *Connecticut Bank* (1851) 21 Conn. 148.

Buckingham's Appeal (1891) 60 Conn. 143, 22 Atl. 509.

After this complete change of ownership has taken place, the State attempts to take ten per cent. of the property away from the new owners because the former owner evaded his duty. How can this be described but as the punishment of one person for the guilt of another?

And the State cannot justify this seizure on the ground of the power of regulation which it undoubtedly possesses over the devolution of the property of deceased persons. The only principle upon which this penalty can be sustained is that, at death, the property of the decedent becomes the

property of the State and that the State can confiscate all or any part of that property which it sees fit. For if that property belongs to any other person or group of persons, the State, by this penalty, is depriving them of it for the punishment of another. The theory of inheritance taxation does not support the contention that the State may seize the property of deceased persons. That theory rests upon the undoubted fact that the State has, from earliest times, designated the persons entitled to succession. The reason it has done so is well stated by Blackstone in

Book II, p. 209 (Sharwood's Ed., 1872).

> "All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society; for, then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But, as under civilized governments, which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property by disposing of his possessions by will; or in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion."

And in accordance with this principle, the State has from time to time made various classifications

of those persons to whom the property of a deceased person should descend, those classifications being dependent upon contemporary considerations of political or military expedience. With this power of designation in mind, it might seem to be a logical deduction that the State could designate itself as the recipient of all or any part of such property. But, however, appealing to reason this deduction may be, it stumbles against this hard fact of history—that never since the law of inheritance reached a stage that can be assimilated to our present system has the State exercised any such prerogative.

Pollock & Maitland, "History of English Law," Book 2, Chapter 4.
"Select Essays in Anglo-American Legal History," Vol. 3, pp. 723-736, 770-777.

The same authors point out that if any such prerogative ever existed, the evidence of it consists of dubious interpretations and uncertain inferences. The State has always recognized certain groups as entitled to the benefits of that property, especially creditors and relatives. So ancient has been this recognition that it has come to seem, in the words of Blackstone, a "secondary law of nature." And yet this statute, its penal character concealed under a cloak of orderly taxation, the full force of its blow timed for the hour of confusion and helplessness that follows death, snatches from creditors and heirs their just due. Such legislation strikes a blow at the foundations of all business. The great structure of credit which is the framework of all business rests upon the liability of a man's estate for the debts of his life. Who would lend a dollar in the absence of

that liability? This statute assumes that there are such lenders. It makes no distinction between solvent and insolvent estates. To punish the omission of a dead man, it robs his honest creditors of ten per cent. of their due. Suppose an estate of $100,000 is liable to ante-mortem claims of an equal amount. By the operation of this statute, the creditors may have to content themselves with ninety cents on the dollar. Upon the same vicious principle why cannot the State seize all?

The true nature of this penalty may be illustrated by the following analogy. The alienation and conveyance of real property is as much subject to regulation by the State as is the inheritance thereof. And it is conceivable that the grantee of such property might be taxed for the privilege of taking it. Such a tax would be analogous to an inheritance tax. But suppose the Legislature should declare that unless every owner of property could prove that his grantor had paid his taxes, he, the grantee, should be liable not only to the amount of the unpaid taxes but to an amount five times as great?

There is another aspect of the case which seems to us to have a bearing upon the position taken by the State of Connecticut in this matter. In this appeal the State is charged with attempting by the statute in question to confiscate ten per centum of all estates.

By way of answer it says that the exaction is not confiscation but a punishment for a "wrong which has been done the public treasury" and is justly measured by and limited to the property of the decedent which wrongfully escaped taxation.

But we ask, who is punished? The idea of a punishment without a victim, seems absurd.

The absurdity, however, is not present here. There *is* a victim, who feels the sting of punishment. But the victim is innocent of the offense. And this we have urged against the State.

But the State replies, as it seems to us, by a partial retraction of its first position. It exacts the penalty as a redress for wrong doing, but not from the person guilty of wrong. And it defends this vicarious punishment by contending that no one is harmed by it. That is to say, the creditors and heirs of the decedent who in fact suffer the loss, in theory lose nothing. The "estate" pays the penalty.

Can the State set up this legal fiction of a personalty called the estate which comes into existence at the death of a human being and passes out of existence when the heirs and creditors have received their due; which cannot plead its wrongs, since it is incapable of suffering, yet cannot be heard through those who do suffer since they are not wronged?

The case of *Cornwall* v. *Todd*, 38 Conn. 443 is cited by the defendant in error in support of this proposition. That case states the following:

> "Who, for the purpose of taxation is to be regarded as the owner of this property? We think we may with propriety say that it belongs to the estate. It does not belong to the executor, except in a limited sense as we have already seen. It does not belong to the heir before distribution; and ordinarily the legatee has no claim until the debts are paid."

In this case was involved the construction of a statute relating to the listing of property for taxation and it was held that, for the purpose of giving a habitation and a name to the ownership of

the property, it was in accord with "common parlance" to employ the word estate as "an intangible being or person capable of owning property."

Cornwall v. *Todd*, 38 Conn. 443, 446.

But this is very far from holding that upon the death of the decedent there comes into being an entity who, for the purpose of punishment, may be visited with penalties for wrongs committed by the decedent, and yet be without the protection of the due process clause of the Constitution.

It would be just as logical to say that the Cornwall case is authority for the proposition that a conveyance of land by deed to "the estate of John Jones" would satisfy the rule of the common law that a grant must be to some person in being.

There can be but one basis for the position taken by the State in the statute in question, namely;

(1) Upon the death of a property owner his property ceases to be privately owned.
(2) The State may direct to whom it shall pass.
(3) Since the State may direct to whom it may pass it may direct that it all pass to the State; or to whomsoever the State may choose as beneficiary.
(4) Therefore, if the State makes deductions from the property of a decedent no one can complain since no one is harmed.

It is certainly the established law that the right of succession as heir or devisee is subject to regulation by the State.

But it has never been adjudicated that the right may be utterly destroyed by the State; that is that the State may appropriate the property of

decedents *because* private ownership of specific property ceases with death except by grace of the state.

True the right may be subject to taxation; and the exigencies of government might require a tax rate so high as to leave nothing for the creditor or heir.

But the doctrine that the right to tax implies the right to destroy is not inconsistent with the idea of private ownership.

So the right by taxation to destroy the succession is not inconsistent with the theory that the *right* to succession exists and exists beyond the power of the government to destroy it.

So we come to the conclusion that what the State of Connecticut contends for in this case is not the right to tax the succession or to impose conditions upon its enjoyment, but the power of the state utterly to deny its existence as a right.

Thus in the decision by the Supreme Court of Connecticut the opinion refers to the plaintiffs' claims as resting upon the premise that upon the death of the owner her property passed to the distributees subject to the payment of the just debts of the estate, and the Court hold that this promise is unfounded.

> "Both claims rest upon the unfounded premise that the property of this estate upon the decease of the owner, passed to the distributees, subject to the payment of the just debts of the estate."
>
> Record p. 12.

This we respectfully submit is a denial of any right of private ownership in the property of this estate.

We concede that the state, for purposes of

administration, might take the legal title. But would it have the beneficial interest also?

And if so what power could dispossess the State of that beneficial ownership when the administration was complete?

But to say that the property did not pass at death to the distributees is counter to the doctrine laid down by this Court.

> "Like other rules of descent it was subject to change by the law-making power as to any land not already passed to the heir by the death of the owner. Not until the ancestor dies is there any vested right in the heir."
>
> *Jefferson* v. *Fink*, 247 U. S. 288, 294.

If then the property of Lena McMullen at her death became the property of someone other than the State, that someone was entitled to assert the same constitutional guaranties as to that property as was Lena McMullen in her life time. If Lena McMullen could not be penalized for the omissions of another, how can the creditors and distributees of Lena McMullen be penalized for her omissions?

The answer to this inquiry as we understand the claims of the State, is found in that part of the opinion of the Supreme Court of Errors expressed as follows:

> "The civil action for the recovery of a penalty incurred by a decedent may, by statutory sanction, survive. In effect, this statute is a penalty tax imposed upon the estate because of the delinquency of the decedent, and no less permissible than the penalty tax against the decedent, kept alive by statutory sanction."
>
> Record, p. 13.

The survival here referred to is a mere application of the principle, which no modern civilized government has ever invaded, that the property of a decedent shall answer for his debts.

But in the present case there is no debt owned by the decedent.

There is no survival of an action, for no cause of action under this statute ever arose against the decedent.

It is not a penalty incurred by the decedent in her life time, for so long as she lived the statute was inapplicable to her.

It is not a tax, for its primary object is punishment and not revenue.

It is not a tax upon the property of the decedent as a just and equitable contribution from that sort of property to the expense of government, for only a small proportion of similar property pays any such amount by way of taxation.

As an exaction by way of penalty, it can be justified only upon the theory that in the transition of ownership from the dead to the living, quite independent of any tax on the succession, the State may take what it chooses and leave the balance to the heir.

II.

Chapter 50 and Section 1190 violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, because, in imposing a penalty, they create a presumption of guilt of the omission for which the penalty is imposed.

Chapter 50 of the Public Acts of 1919 requires the personal representative of the decedent to file with the inventory of the estate an affidavit setting forth all the items of the estate upon which the decedent paid taxes during the year prior to his death. Automatically a tax of ten per cent. is then imposed upon any items which appear in the inventory but which do not appear in the affidavit. The personal representative may then obtain a proportionate reduction of this amount by showing that the decedent paid taxes upon the property during some portion of the five years prior to his death or that he did not own the property during some portion of that five-year period.

Thus, in the absence of any proof whatsoever on the part of the State, the decedent is presumed to have been guilty of an evasion of his taxes for five years and ten per cent. of his property forfeited.

The whole burden of escaping this punishment rests upon his personal representatives. They must prove

A. In the first instance, that the decedent paid all his taxes during the year prior to his death.

B. Failing to sustain that burden, they must prove either that he paid his taxes during some portion of the five years prior to his death or that he did not own the property during some portion of that period.

It is clear that, in the absence of Statute, there would be no presumption that the decedent had been guilty. It is said in Cooley on Taxation, Vol. 1, p. 461:

"There is no legal presumption either that the citizen will, if possible, evade his duties,

or, on the other hand, that the government will exact unjustly or beyond its needs."

See also: Re Estate of Issac Minor (1919), Calif. 180 Pac. 813.

Is this Statute unconstitutional because it reverses the presumption of innocence and creates a rebuttable presumption of guilt?

It is undoubtedly within the power of the Legislature to create rebuttable presumptions. But that power is not without limit. In the case of *McFarland* v. *American Sugar Refining Co.* (1916) 241 U. S. 79, 86, 60 L. Ed. 899, 904, Justice Holmes says:

> "As to presumptions, of course the Legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is essential that there shall be some rational connection between the fact proved and the ultimate fact presumed and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. *Mobile, Jackson and Kansas City R. R. Co.* v. *Turnispeed*, 219 U. S. 35, 43, 55 L. Ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N.C.C. A. 243. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the power of the Legislature to declare an individual guilty or presumptively guilty of a crime."

And it is said in *Commonwealth* v. *Minor* (1889) 88 Ky. 422, 11 S. W. 472:

> "In all statutory crimes, it is competent for the Legislature to say that certain acts proven by the Commonwealth shall be sufficient to

make out a presumptive case against the accused and cast the burden of proof upon him, provided the burden is not cast upon him to prove his innocence, without first requiring the Commonwealth to prove some material fact or circumstance conducing to prove the guilt of the accused."

And in the following cases, statutes were held to be unconstitutional because they reversed the presumption of innocence without requiring the State, in the first instance, to prove some fact which would have a reasonable tendency to establish guilt unless controverted.

Bailey v. *Alabama* (1910), 219 U. S. 219, 55 L. Ed. 191, 31 Sup. Ct. Rep. 145—

making failure to perform a labor contract presumptive evidence of fraudulent intent.

Opinion of the Justices (1911), 208 Mass. 619, 94 N. E. 1044—

making the fact that a laborer worked more than eight hours in any one day presumptive evidence of violation of an eight-hour day law when, by the terms of the law, a longer day was permitted under certain circumstances.

In Re Wong Hane (1895) 108 Cal. 680, 41 Pac. 492—

making possession of a lottery ticket presumptive evidence of unlawful purpose.

Louisville & Nashville R. R. Co. v. *R. R. Commission of Tennessee* (1884) 19 Fed. 679—

making certificate of disapproval of rates by the Commission presumptive evidence of extortion.

Wynehamer v. *People* (1856) 13 N. Y. 378, 446—

making delivery presumptive evidence of an unlawful sale of liquor.

In the following cases, statutes creating rebuttable presumptions of guilt, were upheld but, in every case, the statute met the two requirements:

FIRST: That the State must first prove some fact before the presumption arises, and

SECOND: That the fact proved must have some reasonable tendency to establish the ultimate fact of guilt so that, in the absence of rebuttal, the State may be said to have made out a fair case.

State v. *Cunningham* (1856) 25 Conn. 195—

making possession of liquor presumptive evidence that it was kept for sale.

State v. *Morgan* (1873) 40 Conn. 44—

making reputation of a house presumptive evidence that liquor was sold there.

Hawes v. *State* (1920, Ga.) 103 S. E. 170.

Black v. *State* (1919, Fla.) 81 So. 411.

Griffin v. *State* (1914) 142 Ga. 636, 83 S. E. 540.

People ex rel Woronoff v. *Mallon* (1918) 222 N. Y. 456, 119 N. E. 102.

Ex Parte Woodward (1912) 181 Ala. 97, 61 So. 295.

People v. *McBride* (1908) 234 Ill. 146, 84 N. E. 865.

Banks v. *Georgia* (1905) 124 Ga. 15, 52 S. E. 74.

Commonwealth v. *Anselvitch* (1904) 186 Mass. 376, 71 N. E. 790.

State v. *Beach* (1896) 147 Ind. 74, 46 N. E. 145.

People v. *Cannon* (1893) 139 N. Y. 32, 34 N. E. 759.

A situation directly in point is presented in the case of *Cummings* v. *State of Missouri* (1866) 4 Wall. (U. S.) 277, where the Court considered a statute of the State of Missouri which provided a penalty for anyone who, among other things, should act as a priest without first taking an oath that he had been loyal to the Union during the Civil War. The Court, speaking through Justice Field, said:

> "The clauses in question subvert the presumptions of innocence and alter the rules of evidence which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way, by an inquisition in the nature of an expurgatory oath into the conscience of the parties."

Now, if it violates the fundamental law to penalize a party because he fails to swear that he has always been loyal, how can this Statute be upheld which provides a penalty for the failure of one person to affirm that an entirely different person paid his taxes? If the Legislature has the power to create such a presumption, it could, upon the same principle declare that every person should be deemed guilty of larceny or of murder and punished therefor unless he proved his innocence.

It is true that the presumption of innocence does not obtain in civil actions.

> *List* v. *Miner* (1901) 74 Conn. 50, 49 Atl. 856.

But an action to enforce a penalty for the non-performance of a duty is in substance a criminal action though the proceedings may, in form, be civil. It is said in *Hall* v. *Norfolk & Western R. R. Co.* (1897) 44 W. Va. 36, 40, 28 S. E. 754, 756:

> "It does not make the Statute any the less penal that the penalty is enforced by an action in form civil. A penalty is in the nature of punishment for the non-performance of an act or for the performance of an unlawful act. It involves the idea of punishment, whether enforced by a civil or a criminal procedure."

> *Pardee* v. *Smith* (1873) 27 Mich. 33.

And it is well established that the State must keep within constitutional limits in prescribing the procedure for the collection of taxes.

> *McMillen* v. *Anderson* (1877) 95 U. S. 37. See also *Louisville School Board* v. *King* (1908) 127 Ky. 824, 107 S. W. 247.

In the case of *Boyd* v. *United States* (1885) 116 U. S. 616, the Court considered a Statute which provided that any violation of the Customs Laws should work a forfeiture of the goods, and that, in a proceeding to establish the forfeiture, the owner could be compelled to produce his books, invoices, and papers. In holding that this violated the Fourth and Fifth Amendments, Judge Bradley said at p. 634:

"The information, though technically a civil proceeding, is in substance and effect a criminal one.—As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution and of that portion of the Fifth Amendment which declares that no person in any criminal case shall be compelled to be a witness against himself; and we are further of the opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself within the meaning of the Fifth Amendment to the Constitution and is the equivalent of a search and seizure—within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purposes. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right as if it consisted more of sound than in substance."

And to the same effect in holding that private books may not be seized in order to lay the basis for an action for penalties for evasion of taxes is

People ex rel Ferguson v. *Reardon* (1910) 197 N. Y. 236 90 N. E. 829.

If the State, in enforcing penalties for non-payment of taxes, cannot deprive the citizen of his constitutional immunity from search and seizure and if, in such proceedings, the citizen cannot be compelled to become a witness against himself, upon what conceivable basis can it be maintained that such citizen may be denied the presumption of innocence?

This denial throws upon the personal representative a burden which, even in cases where the decedent was innocent of any omission, he may not be able to sustain. In the first place, he must prove that the decedent paid his taxes. His ability to prove this may depend entirely upon the care which his decedent bestowed upon the keeping of his accounts, or upon the entirely fortuitous circumstance of whether those accounts have escaped fire, theft or other loss. He has no particular or reliable means of knowing the fact which he must prove. All the means of knowing that fact are in the possession of the local or State authorities.

The other burden which this Statute throws upon the personal representative is proof of the fact that his decedent did not own the property in question during a portion of the five-year period. In the case of land this burden, though unwarranted and a denial of due process, would be relatively simple to sustain, owing to the information contained in the land records. But, in the case of personal property toward which the full force of the tax is directed, the burden is unbearable. In most cases, the only reliable record of the date when the decedent acquired his books, his jewelry, his bonds or his furniture was his own memory. In the memory of others, that is quite

speculative. And this Statute does not permit of speculation; it requires an oath. Where is the personal representative to unearth the chronology of the dead man's transactions? Were it as simple as the turning of a leaf, the Statute would, nevertheless, be unconstitutional. But when the tremendous weight of the burden is contemplated, although it may not add one bit to the unconstitutionality of the Statute, it does reveal the danger which lies at the bottom of every infringement of our fundamental law, however slight that infringement may, on the surface, appear to be.

Nor may it be argued that this denial of the presumption of innocence is a mere matter of administrative convenience which would not be carried into the judicial hearing on appeal. In the first place, even if that were true, it would not justify the denial. But it is apparent that this burden would follow the personal representative into court. Suppose the personal representative submits no affidavit to the Tax Commissioner that his decedent paid his taxes; that the Commissioner thereupon sends a bill for ten per cent. of the estate; that the personal representative then takes an appeal as provided in Sec. 1192. Can there be any doubt that the burden would still be on the personal representative? If those facts alone were presented to the Court, can there be any doubt but that the Superior Court would straightway sustain the tax already imposed by the State?

The most effective condemnation of this statute on constitutional grounds is found in defendant's justification of its policy. It is argued by the State that tax dodging is a great public evil; that it is the imperative duty of the State to seek out such offenders and punish them; it is found, how-

ever, that such offenses are difficult of detection; it is also difficult to produce proof of guilt; therefore, the State places upon the personal representatives of a deceased the duty of proving innocence of the guilt, and in the absence of such proof it inflicts a penalty.

If this proposition is in harmony with the Constitution, then the State may, whenever offenses, subject to penalties, are numerous, aggravating and difficult of detection, solve its difficulty by exacting the penalty and calling upon the alleged offender to prove his innocence.

The reported cases of this Court contain many in which statutes imposing penalties for failure to fulfill the requirements of the tax laws have been sustained.

But we have not found a single case in which such penalties have been based upon a presumption of guilt.

In every instance which we have noted, the State must charge and prove the delinquency before it can collect the penalty or declare the forfeiture.

The matter was thus considered in a Kentucky case where the question of tax penalties and forfeiture was under consideration:

> "It is equally clear the legislature may impose upon the taxpayer the duty of listing his property for taxation, and may prescribe for the neglect of the duty so imposed, penalties reaching even to the forfeiture of the estate not listed. But when such laws are enacted, the forfeitures prescribed must be regarded as penalties, and they cannot be inflicted until inquiry has first been made and the commission of the offense ascertained by due process of law."

Marshall v. *McDaniel*, 12 Bush, 378, 384.
Middleton v. *Mee*, 277 Fed. 492, 501.

As we understand the Tax Commissioner, he does not contend that this penalty would be valid if it rested upon a presumption of guilt. He denies that such a presumption exists. The subject is discussed in the opinion of the State Supreme Court as follows:

> "Sec. 1190 does not create a presumption of guilt of the omission of not listing or paying the tax for the five year period. It imposes a penalty based upon a tax rate for the five year period. It imposes a penalty based upon a tax rate for the five year period and it gives the representatives of the estate the privilege of reducing this by proof of the amount of the tax paid or that the decedent did not own the property for any of this period. The extent of the penalty was, within reasonable limits, within the legislative discretion. If the proof be difficult for the representatives to make, it is better so than not to have the privilege of making it at all."
>
> Record, p. 13.

But, we respectfully urge, this is no answer to our objection. It merely points out our error in construing the amount of the penalty. We construed it as a tax at the rate of 2% for each of five years, implying a presumption of ownership and wrong-doing five times repeated. The State Court finds this to be incorrect and rules that it is a penalty of 10%, for the failure in the taxable year preceding the death, and providing that conduct during any one of the five preceding years may be shown as a sort of mitigation.

But what does this mean except that instead of five presumptions, we have one presumption.

On what is the 10% inflicted unless upon the presumption

(1) That all property owned by the decedent at the time of her death was owned by her on the assessment day of the preceding taxable year.
(2) That owning such property, she wrongfully failed to return it for taxation.

The Court says, "If the proof be difficult, it is better so than not to have the privilege of making it at all." That would be true if the 10% were exacted by due process of law. But wherein does the Tax Commissioner answer our objection that the initial penalty of 10% is based on a presumption of guilt?

In concluding this presentation of our case on the first Specification of Error, we respectfully urge upon the attention of the Court that we do not claim that before death any particular person can claim an interest statutory or constitutional in the estate of one about to die. But we do claim

(1) That property is no less privately owned immediately after the death of an owner than immediately before.
(2) That the State may regulate the succession but it cannot take possession of the estate in whole *or in part* as its own; nor can it arbitrarily bestow it upon some person having no reasonable connection with the decedent and selected merely as the recipient of the State's favor.

That is to say, the property of the estate of Lena McMullen, immediately after her death, was privately owned and could not be taken except by due process of law.

It makes no difference whether that ownership for the period of administration is considered as a continuation of the ownership by Lena McMullen or whether it is regarded as the ownership by the

succession in title. There was no interruption in the continuous existence of a private ownership protected by the due process clause of the Constitution. If the ownership is that of Lena McMullen, it cannot be penalized under a presumption of wrong done by her to the public treasury. If the ownership is that of her successors in title, they cannot be penalized because of the fault of their predecessor.

It is true that tax dodging is an evil, difficult of detection, and burdensome to the State.

But there are other offenses equally difficult to detect and even more burdensome.

Would it then be permissible to deduct from every estate a large percentage unless the creditors and heirs could prove that the decedent had violated none of the penal laws of the State?

III.

Section 1190 is void as an ex post facto law.

A law that "inflicts greater punishment than the law did when the crime was committed" is ex post facto.

> *State* v. *Hoyt* (1880) 47 Conn. 518.
> *Bridgeport* v. *Hubbell* (1824) 5 Conn. 237.

Section 1190 was passed in 1915 and went into effect on the first day of August. Lena McMullen died on the twentieth of May, 1919. By the terms of the Statute, unless her executors can prove that she paid her taxes during the year 1914, a penalty

of two per cent. of the value of that property will be exacted for that omission. Yet, in the year 1914, the date of the omission, the only penalty provided by law therefor was the addition of ten per cent. to the assessed valuation of the omitted property. This law of 1915 thus attempts to reach into the past and to provide a "greater punishment than the law did when the crime was committed." Statutes providing penalties for prior omissions to pay taxes are within the constitutional prohibition of ex post facto laws.

Gager v. *Prout* (1891) 48 Oh. St. 89, 26 N. E. 1013.
Anderson v. *Ritterbusch* (1908) 22 Okl. 761, 98 Pac. 1002.

CONCLUSION.

We respectfully submit there is but one ground on which this statute can be sustained, namely, that whenever the State wishes to carry its exactions to that length, it may take the property of decedents, without regard to creditors or distributees; and that the method by which it does so is of no consequence because in the last analysis property of deceased persons belongs to the State, so that neither creditors nor distributees may complain of what they ultimately receive where their right to receive anything exists only by favor of the legislature.

Respectfully submitted,

WILLIAM H. COMLEY,

Attorney for the Plaintiffs in Error.

APPENDIX.

Sec. 1138. Tax Lists, When to be Given In. Each resident of any town liable to give in a list and pay taxes therein shall, except as otherwise specially provided by law, on or before the first day of November, annually, give in his list, made and sworn to as prescribed by law, making a separate description of each parcel of real estate; and where reference can be made to a map on file in the town clerk's office such reference shall be sufficient description; and if he shall neglect or refuse so to do, the assessors shall fill out a list for him, putting therein all the property which they have reason to believe is owned by him, liable to taxation, at the actual valuation thereof from the best information they can obtain, and add thereto ten per centum of such valuation, and in said list they shall make a separate description and valuation of each parcel of real estate. When the first day of November comes on Sunday, then the list may be made out and sworn to on the day following.

Sec. 1188. Payment to State Treasurer of Taxes on Choses In Action. Any person may take or send to the office of the treasurer of this state any bond, note, or other chose in action, or a description of the same, and may pay to the state a tax of two per centum on the face amount thereof for five years or, at the option of such person, for a greater or less number of years at the same rate, under such regulations as the treasurer may prescribe, and the treasurer shall thereupon make an indorsement upon said bond, note or other chose in action, or shall give a receipt for the tax thereon, describing said bond,

note or other chose in action, certifying that the same is exempt from all taxation for the period of five years, or for such longer or shorter period for which a proportionate tax has been paid, which indorsement or receipt shall be duly dated and signed in the name of the treasurer and with the seal of the treasurer affixed. Said treasurer shall keep a record of such indorsements and receipts with a description of such bonds, notes or other choses in action, together with the name and address of the party presenting the same and date of registration; and said treasurer shall, annually, on or before the tenth day of November, mail to the town clerk of each town a general description of all such bonds, notes or other choses in action so registered before the first day of October preceding by persons residing in such town, the date and period of such registration, and the names of the persons by whom the same were registered; and all bonds, notes or other choses in action so indorsed, or described in such a receipt, shall be exempt from all taxation in the state during the period for which said tax is so paid.

SEC. 1191. TAX COMMISSIONER TO NOTIFY STATE TREASURER AND COURT OF PROBATE WHEN ANY TAX IS DUE. Within ninety days after the receipt of the inventory and affidavit, or corrected, amended or supplemental inventory and appraisal of an estate, the tax commissioner shall file with the state treasurer and with the court of probate wherein such estate is in course of settlement, a statement of the name of any estate which is liable for such tax and the amount thereof. The tax commissioner may, at any time within ninety days, correct such statement on account of an error or omission by sending a corrected statement to the treasurer and judge of probate, showing the name

of the estate and the amount of the tax as corrected. Such court of probate shall, within ten days from the receipt of such statement or corrected statement, mail a copy of the same to the executor, administrator or representative of such estate at his last known address.

SEC. 1192. APPEAL FROM THE DECISION OF THE TAX COMMISSIONER ALLOWED. Any executor, administrator or representative of such an estate aggrieved by the action of the tax commissioner in determining such tax, if unable to agree with the tax commissioner upon the amount of such tax as provided in section 1190, may, within ninety days from the time of the filing by the tax commissioner of such statement or corrected statement with the judge of probate, make application in the nature of an appeal therefrom to the superior court of the county in which such probate court is located which shall be accompanied by a citation to said tax commissioner to appear before such court. Such citation shall be signed by the same authority and such appeal shall be returnable at the same time and served and returned in the same manner as is required in case of a summons in a civil action. The authority issuing such citation shall take from the applicant a bond or recognizance in the sum of one hundred and fifty dollars to said tax commissioner, with surety to prosecute the application to effect and to comply with the orders and decrees of the court in the premises. Such applications shall be preferred cases, to be heard, unless cause appear to the contrary, at the first session, by the court and the pendency of such application shall, subject to the order of the court, suspend action upon the tax against the applicant. Such court shall have

power to grant such relief as the law allows, and upon such applications costs may be taxed at the discretion of the court.

SEC. 1193. COLLECTION OF TAX BY STATE TREASURER. If no appeal shall be taken by any executor, administrator or other representative as provided in section 1192 or, if taken, and a tax is found to be due the state, the tax shall be paid to the state treasurer by the executor, administrator or other representative of the estate, and the treasurer shall collect the same.

INDEX OF POINTS

Page

Statement of the Case 2
Brief of the Argument 3

POINT 1

The power of taxation is an inherent right of sovereignty 4

POINT 2

Every presumption is in favor of the constitutionality of an act of the legislature 4

POINT 3

Where a statute is capable of two or more interpretations the courts will adopt that interpretation which will uphold the constitutionality of the statute 5

POINT 4

The obligation of the decedent was to return her taxable property for local taxation in the town of which she was a resident 7

POINT 5

Section 1190 of the General Statutes of Connecticut Revision of 1918 and Chapter 50 of the Public Acts of 1919 of the State of Connecticut do not deprive the plaintiffs in error and those whom the plaintiffs in error represent as executors of property without due process of law 8

A. By an imposition of a penalty for an omission of which said plaintiffs in error and those whom said plaintiffs in error represent are innocent 8

B. By the operation of a presumption of guilt of an omission for which said penalty is imposed 16

POINT 6

Section 1190 is not void as an *ex post facto* law 18
Conclusion 21

APPENDIX

General Statutes, Conn. Rev. 1918

	Page
Section 1127 — Assessors to publish notices requiring lists	22
Section 1138 — Tax lists, when to be given in	22
Section 1149 — Perfected lists and abstract for public inspection. Penalty	22
Section 1188 — Payment to state treasurer of taxes on choses in action	23
Section 1190 — Rate of tax on property on which no state or municipal tax was paid in preceding year	24
Section 1191 — Tax commissioner to notify state treasurer and court of probate when any tax is due	25
Section 1192 — Appeal from the decision of the tax commissioner allowed	25
Section 5007 — Order of payment of claims	26

Public Acts of 1919.

Chapter 50 — An act amending an act concerning inventories of estates	27

TABLE OF CASES CITED.

		Page
Balto. & Susquehanna R. R. *v.* Nesbit	51 U. S. 401	20
Calder *v.* Bull	3 Dallas U. S. 386	19, 20
Carpenter *v.* Penn.	58 U. S. 463	21
Cornwall *v.* Todd	38 Conn 443	9
Davidson *v.* New Orleans	96 U. S. 104	14
Fletcher *v.* Peck	6 Cranch 87	20
Ex parte Garland	71 U. S. 333	21
Gibson *v.* Miss.	162 U. S. 590	21
Hale's Appeal from Probate	69 Conn. 611	12
Hatheway *v.* Smith	79 Conn. 506	9, 13
Hawkes *v.* N. Y.	170 U. S. 189	21
Jackson *v.* Bevins	74 Conn. 96	11
Johannessen *v.* U. S.	225 U. S. 227	21
Johnes *v.* Jackson, Exr.	67 Conn. 81	12
Kring *v.* Missouri	107 U. S. 221	21
Knowlton *v.* Moore	178 U. S. 41	9, 13
League *v.* Texas	184 U. S. 156	21
McAdams *v.* Starr	74 Conn. 85	12
Mallett *v.* N. C.	181 U. S. 589	21
Malloy *v.* South Carolina	237 U. S. 180	21
Medley, Petitioner	134 U. S. 161	21
Ogden *v.* Saunders	12 Wheat. 266	20
Orr *v.* Gilman	183 U. S 278	21
Plummer *v.* Coler	178 U. S. 115	9, 13
Rooney *v.* North Dakota	196 U. S. 319	21
Satterlee *v.* Matthewson	2 Peters 380	20
In re Sawyer, et alii	124 U. S. 200	21
Stone et al. Appeal	74 Conn. 301	9, 13
Thompson *v.* Missouri	171 U. S. 380	21
Watson *v.* Mercer	33 U. S. 110	20
Western Union Tel. Co. *v.* State of Indiana	165 U. S. 304	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

BANKERS TRUST COMPANY, ET AL.,
Plaintiffs in Error
v.
WILLIAM H. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT,
Defendant in Error

No. 169

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF CONNECTICUT

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE

Lena McMullen died testate at Norwalk, Connecticut, on the 20th day of May, 1919, possessed of an estate which had been valued at $264,237.46. After their due qualifications as executors, the plaintiffs filed with the inventory of the estate an affidavit as required by Chapter 50 of the Public Acts of 1919 of the State of Connecticut setting forth the items included in such inventory on which a tax had been assessed by any town or city during the last completed taxing period or paid to the State during the year next preceding the date of the death of the decedent; the assessed value of each item, and the place of assessment or payment of the tax on each item. Appearing in the said inventory but not in said affidavit were certain taxable bonds, notes, book accounts and tangible personalty. Upon receipt of copies of said inventory and affidavit, the Tax Commissioner in accordance with the provisions of Section 1191 of the General Statutes of Connecticut, Revision of 1918, filed with the State Treasurer and with the Court of Probate wherein the estate of Lena McMullen was in course of settlement a statement that the said estate of Lena McMullen was liable under the provisions of Section 1190 of the General Statutes of Connecticut, Revision of 1918, for a tax in the amount of $10,286.39. The correctness of the amount is admitted by the plaintiffs in error. The sole question before this Court is as to the constitutionality of the statutes under which it was assessed.

The plaintiffs in pursuance with the provisions of Section 1192 of the General Statutes of Connecticut, Revision of 1918 then made an application in the nature of an appeal to the Superior Court for the County of Fairfield in the State of Connecticut praying that the tax be declared illegal

on the ground that the statutes authorizing the assessment thereof were unconstitutional. The defendant filed a demurrer to this application. Said Superior Court reserved the questions of law arising upon the defendant's demurrer for the advice of said Supreme Court of Errors. Said Supreme Court of Errors advised said Superior Court to sustain the demurrer and dismiss the application. Pursuant to the advice of said Supreme Court of Errors, said Superior Court sustained the defendant's demurrer and dismissed the plaintiff's application in the nature of an appeal. Thereupon the plaintiffs in error filed a petition for writ of error to the Supreme Court of the United States and said writ of error was allowed by the Honorable George W. Wheeler, Chief Justice of the Supreme Court of Errors and presiding judge of the Superior Court of the State of Connecticut, all of which by the record more fully appears.

BRIEF OF ARGUMENT

1. The power of taxation is an inherent right of sovereignty.

2. Every presumption is in favor of the constitutionality of an act of the legislature.

3. Where a statute is capable of two or more interpretations the courts will adopt that interpretation which will uphold the constitutionality of the statute.

4. The obligation of the decedent was to return her taxable property for local taxation in the town of which she was a resident.

5. Secion 1190 of the General Statutes of Connecticut, Revision of 1918, and Chapter 50 of the Public Acts of 1919 of the State of Connecticut, do not deprive the

plaintiffs in error and those whom the plaintiffs in error represent as executors of property without due process of law:

A. By an imposition of a penalty for an omission of which said plaintiffs in error and those whom said plaintiffs in error represent are innocent.

B. By the creation of a presumption of guilt of an omission for which said penalty is imposed.

6. Section 1190 of the General Statutes of Connecticut, Revision of 1918, is not void as an *ex post facto* law.

1.

THE POWER OF TAXATION IS AN INHERENT RIGHT OF SOVEREIGNTY

The power of taxation is an incident of sovereignty and is possessed by the government without being expressly conferred by the people. It is a legislative power.

Cooley on Taxation Vol 1 p. 7 (3rd ed.)

2.

EVERY PRESUMPTION IS IN FAVOR OF THE CONSTITUTIONALITY OF AN ACT OF THE LEGISLATURE

The presumption is always in favor of the constitutionality of a statute. The courts will not adjudge it invalid unless its violation of the constitution is, in their judgment, clear, complete and unmistakable.

Black's Constitutional Law p. 68 (3rd. ed.)

3.

WHERE A STATUTE IS CAPABLE OF TWO OR MORE INTERPRETATIONS, THE COURTS WILL ADOPT THAT INTERPRETATION WHICH WILL UPHOLD THE CONSTITUTIONALITY OF THE STATUTE.

The courts will not so construe the law as to make it conflict with the constitution, but will rather put such an interpretation on it as will avoid conflict with the constitution and give it the force of law, if this can be done without extravagance.

Black's Constitutional Law p. 66 (3rd. ed.)

It may be contended that Section 1190 of the General Statutes of Connecticut, Revision of 1918 is capable of two interpretations:

1. This statute may be interpreted as imposing a penalty in the nature of a tax in the amount of 10% of the appraised inventory value of taxable property belonging to the estate and upon which no state tax had been paid during the year preceding the decedent's death, for the evasion of the decedent's obligation to return said property locally for assessment and taxation during the last completed taxing period prior to the decendent's death, which penalty may be reduced, by showing that the obligation either did not exist or had been assumed during one or more of the five years preceding the decedent's death, at the rate of 2% per annum.

2. This statute may be interpreted as imposing a penalty in the nature of a tax of 2% of the appraised inventory value of all taxable property belonging to the estate and upon which no state tax had been paid during the year preceding the decedent's death for each evasion of the decedent's obligation

to return said property locally for assessment and taxation during the five years next preceding the decedent's death.

The first interpretation or construction seems to be the correct one both from the context of the statute itself and from the opinion of the Supreme Court of Errors for the State of Connecticut rendered in this case. (Record p. 12)

It will be seen from an examination of the statute that the requisites precedent to the imposition of this tax are:

1. The property must be taxable.
2. It must belong to the decedent at death.
3. It must have escaped state taxation during the year prior to decedent's death.
4. It must have escaped local taxation during the last completed taxing period.

Then the statute provides that the executor or administrator may "obtain a proportionate deduction from the tax hereby imposed" by showing "that a state, town, or city tax has been paid on any of such property for a portion of said five years or that the ownership of such property has not been in the decedent for a portion of said period."

The provision for a proportionate reduction of the penalty succeeds the imposition of the penalty. The penalty imposed is ten per centum reducible at the rate of two per centum per annum during five years.

This construction is further substantiated by the opinion of the Supreme Court of Errors for the State of Connecticut wherein it is said —

"The tax levied, of two per cent. per annum on the appraised inventory value of the taxable property of the estate upon which no town or city tax has been assessed, or upon which no tax has been paid to the State during the year preceding the date of death of the decedent is exactly the same as if a straight ten per cent. penalty had been paid. The proviso, that this penalty may be reduced proportionately by proof that for any portion of this period such tax has been paid, or that such property was not in the ownership of the decedent, is a consideration shown, or an exception made, in behalf of the estate and indicates that the main purpose of the penalty is to secure the payment of the tax which the decedent did not pay, but this does not change the character of the penalty. If the representative of the decedent cannot make such proof, the estate must pay the full penalty." (Record p. 12)

As a matter of fact the tax assessed was the minimum tax.

4.

THE OBLIGATION OF THE DECEDENT WAS TO RETURN HER TAXABLE PROPERTY FOR LOCAL TAXATION IN THE TOWN OF WHICH SHE WAS A RESIDENT.

The decedent was obligated to return taxable property owned by her on the tax day to the assessors of the town of which she was a resident for assessment and taxation.

> Section 1127 General Statutes of Connecticut, Revision of 1918.

She could have relieved herself of this obligation in regard to choses in action by returning the same to the State Treasurer on or before the tax day and paying a tax

at the rate of four mills per annum on the face amount thereof.

> Section 1188 General Statutes of Connecticut, Revision 1918, as amended by Chapter 284 of the Public Acts of 1919.

It is clear that Section 1188 of the General Statutes as amended by Chapter 284 of the Public Acts of 1919 is merely an offer to a contract of exemption from the obligation to return taxable property for local taxation, insofar as the same consists of choses in action, imposed by Section 1127 of the General Statutes of Connecticut. Non-acceptance of the offer does not relieve the obligation.

5-A.

SECTION 1190 OF THE GENERAL STATUTES OF CONNECTICUT, REVISION OF 1918 AND CHAPTER 50 OF THE PUBLIC ACTS OF 1919 OF THE STATE OF CONNECTICUT DO NOT DEPRIVE THE PLAINTIFFS IN ERROR AND THOSE WHOM THE PLAINTIFFS IN ERROR REPRESENT AS EXECUTORS OF PROPERTY WITHOUT DUE PROCESS OF LAW BY AN IMPOSITION OF A PENALTY FOR AN OMISSION OF WHICH SAID PLAINTIFFS IN ERROR AND THOSE WHOM SAID PLAINTIFFS IN ERROR REPRESENT ARE INNOCENT.

In their assignment of errors, the plaintiffs claim that they and those whom they as executors represent have been deprived of property without due process of law by the imposition of a penalty for an omission of which neither the

plaintiffs in error nor those whom they as executors represent are guilty.

To sustain their contention they must show:

1. That the plaintiffs in error and those whom they as executors represent have been deprived of property by the imposition of a penalty for an omission of which the plaintiffs in error and those whom they as executors represent are innocent.

2. That there is lack of due process of law.

(1)

It is well settled that the power of the state to regulate the devolution of property upon death is exclusive.

> Knowlton *v.* Moore, 178 U. S., 41 at 59.
> Plummer *v.* Coler, 178 U. S., at 115.
> Stone et al. Appeal, 74 Conn., 303, 309.
> Hathaway *v.* Smith, 79 Conn., 506.

The Supreme Court of Errors for the State of Connecticut in Cornwall v. Todd, 38 Conn., 443 at p. 445, said that

> "Executors and administrators are officers of the law. Ordinarily they have no interest in the property held by them as such. The legal title vests in them merely to enable them to collect, care for and dispose of the property for the payment of debts and for distribution among heirs or legatees. It is for a specific purpose and for a limited time, usually a year more or less."

again at p. 446

> "Who, for the purposes of taxation, is to be regarded as the owner of this property? We think

> so may with propriety say that it belongs to the estate. It does not belong to the executor, except to a limited extent, as we have already seen. It does not belong to the heir before distribution; and so distinctly the legatee has no claim until the debts are paid. In common parlance we speak of the property *as the estate's*, and of the different items of property as belonging to the estate. But when the statute authorizes the executor to put the property to the use in the name of the deceased person's estate, it regards the estate as an intangible being or person capable of owning property. The executor or administrator represents that being, and speaks and acts for it, and in its name and behalf.
>
> Again. So far as property is concerned, and for the purposes of collecting and paying debts, and doing justice to others, the acts and doings of a deceased person while in life still continue to affect the living. In a certain legal sense, therefore, and for certain purposes, he still lives, and will continue to live until those purposes are fully accomplished. So he is incapable of acting for himself, the executor or administrator represents him."

It therefore appears that the executors have no interest in the property of the estate and consequently cannot be deprived of any of it.

The executors represent the decedent. Whether or not the decedent can be conceived of as being deprived of property depends upon the question of whether or not one who has departed this life is capable of holding property or of having any interest therein. Certain it is that the legal title to his real and personal property has vested at his death in the devisees and executors, and the equitable title has passed to those in the land of the living. It therefore follows that the one whom the plaintiffs in error represent as executors, having nothing can be deprived of nothing. If, how-

ever, it is conceivable to regard the decedent as possessing the property through her executors or her estate during the period of administration and up to the time of distribution, it may be admitted that she is being deprived of property through the medium of her estate; but it is also a fact that if this is the case she is being deprived of property for an omission of which she was guilty.

From the use of the word "those" instead of the word "her" in the assignment of errors of the plaintiffs-in-error, it is apparent that the plaintiffs-in-error have not the decedent in mind as one who is being deprived of property and in spite of the language of the Supreme Court of Errors for the State of Connecticut regard themselves as representing not the decedent, but others, as for instance, the creditors, legatees, and devisees. Assuming for the purpose of argument merely that the executors do represent the creditors, devisees and legatees, it is important to ascertain what property, if any, they are being deprived of.

The right of a creditor of a decedent against the decedent's estate is not as a rule against any particular property belonging to the decedent's estate, but is merely a right to have his claim against the decedent satisfied out of the property of the decedent's estate. If there is sufficient property in the estate to satisfy the claims of the creditors outside of the amount of the penalty in the nature of a tax in this case it cannot be claimed that the creditor is being deprived of any property. Nowhere does it appear in the record that the present estate is insolvent or liable to be insolvent by reason of the payment of this tax.

The law of Connecticut is that debts of the decedent are to be paid from personalty in the first instance.

Jackson *v.* Bevins, 74 Conn., 96.

It does not appear in the record that the personalty was insufficient to satisfy the claims of creditors and it therefore does not appear that the executors have been compelled to sell any of the real estate belonging to this estate. The inevitable conclusion is that the devisees have not been deprived of any property.

It is settled law in Connecticut that upon the death of any testator, title to the real estate vests in the devisee, while legal title in the personalty vests in the executor. The right of the legatee is merely an equitable one; a right to compel distribution after the payment of (1) Funeral expenses. (2) Expenses of the last sickness. (3) Taxes of the State and The United States. (4) Debts of the decedent.

> Sec. 5007 General Statutes of Connecticut, Revision 1918.

The legatee has no legal title to the personalty and the extent or value of his equitable right is not known until distribution.

> Johnes *v.* Jackson, Exr., 67 Conn., 81 at 88.
> Hale's Appeal from Probate, 69 Conn., 611.
> McAdams *v.* Starr, 74 Conn., 85 at 86.

The record does not disclose that the equitable right of anyone, with the possible exception of the residuary legatee, has had its value impaired by the imposition of the penalty in the nature of a tax. The right of the residuary legatee is exceedingly vague and indefinite. The residuary legatee is not entitled to anything until everybody including the undertaker, the doctor, the State and United States, creditors, specific legatees, devisees, and others have been satisfied. To claim that he is being deprived of property because of the act of the decedent and the consequent penalty is as illogical as to claim that he is being deprived of property

because of the death of the decedent and the consequent funeral expenses and expenses of administration.

The devisees and legatees are not entitled to the whole of the property with the right to pay the charges, debts and expenses detailed above. They are entitled only to what remains after those charges and expenses are paid.

The right of the decedent to designate the manner in which she desires her property to be distributed and the right of the devisees and legatees to take in accordance with that distribution is a mere statutory right granted by the State and having no existence except by reason of the statute and the permission granted by the state.

Plummer v. Coler, 178 U. S., 115.
Knowlton v. Moore, 178 U. S., 41 at 59.
Stone et al. Appeal, 74 Conn., 301 at 302.
Hatheway v. Smith, 79 Conn., 506.

The residuary legatees would therefore be in a position of claiming that the State which gave the decedent the privilege of designating the legatee as the recipient of what was left of her property should not be allowed to impose as a condition upon the exercise of the privilege of giving and of receiving, that the state should be recompensed for the wrong done the state by the decedent. This claim is made in spite of the law so well recognized as to require no citation of authority, that the state has the power to limit and regulate the exercise of the privilege of giving by and of receiving from deceased persons.

The penalty is exacted from the estate while in the custody of the state and for the omission of the decedent whose wishes the state and others carry out, and is a valid exercise of the state's right to impose conditions upon the right of devolution.

(2)

This Court in the case of Davidson *v.* New Orleans, 96 U. S., 104, said —

> "That whenever by the laws of a state, or by the state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Section 1191 of the General Statutes of Connecticut, Revision of 1918 provides that the Tax Commissioner shall file with the Court of Probate wherein the decedent's estate is in course of settlement, a statement of the name of the estate and the amount of tax for which it is liable.

Said statute also provides that the Court of Probate shall within ten days after the receipt of such statement mail a copy of the same to the executor, administrator, or representative of such estate at his last known address. It is therefore apparent that the statutes provide for notice to the plaintiffs in error of the penalty in the nature of a tax imposed upon this estate.

Section 1192 of the General Statutes, State of Connecticut, Revision of 1918 provides that the executor, administrator or representative of an estate who feels aggrieved by the imposition of the tax, may within ninety days from

the time of the filing by the Tax Commissioner of such statement of tax with the Judge of Probate make application to the Superior Court of the County in which such Probate Court is located, in the nature of an appeal and said Superior Court shall have power to grant such relief as the law allows.

Not only is it apparent that the statutes provide ample due process of law, but the record discloses the fact that the plaintiffs have had their "day in court"; (Record pp. 1-8 inclusive) First, in the Superior Court for the County of Fairfield, State of Connecticut. Second, in the Supreme Court of Errors for the State of Connecticut. Third, in the Superior Court for Fairfield County in the State of Connecticut, and are now in the United States Supreme Court. Where then is the lack of due process of law in theory or in fact?

From the foregoing it is apparent:

1. That neither the plaintiffs in error, nor the decedent, whom they as executors represent have been deprived of property.

2. That if the decedent be deemed to have been deprived of property it is because of an omission of which she was guilty.

3. That if the plaintiffs in error are conceived of as representing the creditors, devisees, and legatees, either it does not appear that they have been deprived of property, or it appears that it is a just limitation by the donor of the privilege of giving and receiving property by and from a deceased person upon the exercise of that privilege.

4. In any event there is no lack of due process of law.

5-B.

SECTION 1190 OF THE GENERAL STATUTES OF CONNECTICUT, REVISION OF 1918 AND CHAPTER 50 OF THE PUBLIC ACTS OF 1919 OF THE STATE OF CONNECTICUT DO NOT DEPRIVE THE PLAINTIFFS IN ERROR AND THOSE WHOM THE PLAINTIFFS IN ERROR REPRESENT AS EXECUTORS OF PROPERTY WITHOUT DUE PROCESS OF LAW BY THE CREATION OF A PRESUMPTION OF GUILT OF AN OMISSION FOR WHICH SAID PENALTY IS IMPOSED.

The Supreme Court of Errors for the State of Connecticut has construed the statute in question as imposing a reducible ten per cent. penalty in the nature of a tax for the omission by the decedent to fulfill her obligation to return her taxable property to the assessors during the last completed taxing period. (Record p. 12)

Section 1149 of the General Statutes of Connecticut, Revision of 1918, provides that the assessors shall file with the Town Clerk the tax list of those owning property liable to taxation in the town. Section 1188 of the General Statutes of Connecticut, Revision of 1918 provides that the State Treasurer on or before the tenth day of November shall mail to the Town Clerk of each town a general description of all bonds, notes or other choses in action registered prior to the beginning of the tax period by persons residing in such town, the date and period of such registration and the names of the persons by whom the same were registered. The information as to whether or not the taxable property of the decedent had been assessed during the last completed taxing period by the local assessors or whether such decedent had paid a tax to the state thereon under the provisions of Section 1188 above referred to is a matter of public record furnished and kept by the state.

There is no question as to the right of the state to prescribe the formalities incident to and the information to be submitted by the executor of a decedent's estate as an officer of the law in connection with the administration of a deceased person's estate.

Chapter 50 of the Public Acts of 1919, State of Connecticut provides that the executor at the time of filing the inventory and appraisal of the decedent's estate shall in addition thereto file an affidavit setting forth the items of taxable property in the inventory on which a tax had been assessed locally during the last completed taxing period prior to the decedent's death or upon which a tax had been paid to the State during the year preceding the decedent's death.

The Assessors, Town Clerk and the State Treasurer are public officers and public officers are presumed to have fulfilled their duties. It therefore follows that having complied with the provisions of Chapter 50 of the Public Acts of 1919 above referred to, as the plaintiffs in error admit they did, whatever taxable property appeared in the inventory of the decedent's estate, but did not appear in the affidavit in regard to the assessment and payment of taxes was taxable property which had escaped local and state taxation during the last completed taxing period and year prior to decedent's death. This is a fact and logical conclusion, not a presumption. The only presumption existing is that the Assessors, Town Clerk, and State Treasurer as public officers have performed their duties and this presumption was created long before the passage of said Section 1190 and Chapter 50 of the Public Acts of 1919.

Being a ten per cent. penalty reducible at the rate of two per cent. per annum for each of the five years does not create a presumption of guilt. The omission which is punished is the

one occurring during the last completed taxing period preceding the decedent's death. The decedent's conduct during the four years previous thereto is material only for the purpose of saving to the estate a portion of the ten per cent. penalty.

If there is any objection to be made on the part of the plaintiffs in error to filing the affidavit required by the provisions of Chapter 50 of the Public Acts of 1919 of the State of Connecticut the day for offering that objection has passed. Such objection, if made, should have been filed at the time of filing the inventory of the estate and the plaintiffs in error are estopped to claim at this time that they are prejudiced by the statute with which they have already complied.

Section 1190 of the General Statutes of Connecticut and Chapter 50 of the Public Acts of 1919, of the State of Connecticut do not create any presumption of guilt of an omission on the part of the plaintiffs in error, the decedent whom they as executors represent, or anyone else.

6.

SECTION 1190 IS NOT VOID AS AN EX POST FACTO LAW.

The claim is made by the plaintiffs in error that the statute under which the penalty in the nature of a tax is levied is *ex post facto*. The statute referred to was passed in 1915 and became a law in 1915, and was reenacted in 1917, with a slight amendment in favor of the estates of deceased persons. The offence which is punished is the failure of the decedent to offer for assessment her property to the board of assessors during the completed taxing period next preceding her death.

The decedent died in 1919. The omission which is penalized is the failure of the decedent to offer her property for assessment during the taxing period next preceding the decedent's death, that is, during the taxing period of the year 1918.

The standard of penalty is immaterial so long as it is not an unusual punishment or a confiscatory fine. The plaintiffs in error do not claim that this penalty in the nature of a tax is an unusual punishment or a confiscatory fine, nor could they. This court has sustained the constitutionality of a 50% penalty. It is within the discretion of the legislature to determine the amount of a penalty to be imposed by statute for the nonpayment of taxes.

> Western Union Tel. Co. *v.* State of Indiana, 165 U. S., 304.

The plaintiffs in error are mistaken in their conclusion that because the statute mentions a five-year period and because one of these years, 1914, antedates the statute, that the statute is *ex post facto* within the constitutional prohibition. The five-year period is material only for the purpose of reducing the penalty tax, not for assessing the tax.

The decisions of the court of last resort from the beginning of written law in this United States has been to the effect that *ex post facto* laws as included under the constitutional inhibition, embraces only those laws which are criminal, and this construction has been so long followed that it is without a question the accepted and determined law of the United States.

The conclusion of the Supreme Court in the matter of Calder *v.* Bull in the 3rd of Dallas at page 386 is based upon

the historical conclusions which are considered as the basis for the interpretation of the term "ex post facto."

In the convention at which the constitution was adopted the term was included only after considerable discussion and after it was understood by the promulgating body that Blackstone's definition of *ex post facto* was the one intended by the inclusion of that term and this interpretation has been so long adhered to that there can no longer be any question as to the construction of the term under consideration.

It is so well settled as to require little citation of authority that constitutional provisions forbidding *ex post facto* laws apply only to the laws respecting crimes and criminal punishments; and have no application whatever to other retroactive legislation.

> Gray on Limitations of Taxing Power, page 933.
> citing Calder *v.* Bull, 3 Dallas, U. S., 386.

Ex post facto laws relate to penal and criminal proceedings which impose punishment and forfeitures and not to civil proceedings.

> Watson *v.* Mercer, 33 U. S., 110.

Now it has been solemnly settled by this court that the phrase "ex post facto" is not applicable to civil laws but to penal and criminal laws.

> Balto. & Susquehanna R. R. *v.* Nesbit, 51 U. S., 401, citing, Calder *v.* Bull, 3 Dallas, 386.
> Fletcher *v.* Peck, 6 Cranch, 87.
> Ogden *v.* Saunders, 12 Wheat., 266.
> Satterlee *v.* Matthewson, 2 Peters, 380.

Ex post facto laws have been understood in a restricted sense relating to criminal cases only.

Carpenter *v.* Penn., 58 U. S., 463.
Ex parte Garland, 71 U. S., 333.
Kring *v.* Missouri, 107 U. S., 221, at pages 221. 227, 238.
In re Sawyer, et alii., 124 U. S., 200, at 219.
Medley, Petitioner, 134 U. S., 161 and 171.
Gibson *v.* Miss., 162 U. S., 590.
Hawkes *v.* N. Y., 170 U. S., 189, at 201.
Thompson *v.* Missouri, 171 U. S., 380.
Mallett *v.* N. C., 181 U. S., 589, at 593.
Orr *v.* Gilman, 183 U. S., 278, at 285.
League *v.* Texas, 184 U. S., 156, at p. 161.
Rooney *v.* North Dakota, 196 U. S., 319, at 325.
Johannessen *v.* U. S., 225 U. S., 227, at 242.
Malloy *v.* South Carolina, 237 U. S., p. 180, at 183, 184.

The Supreme Court of Errors for the State of Connecticut has held that the offense here punished is neither a crime nor a misdemeanor. Record p. 11)

CONCLUSION

It is respectfully submitted that Section 1190 of the General Statutes of Connecticut, Revision of 1918 and Chapter 50 of the Public Acts of 1919 of the State of Connecticut are not in conflict with the provisions of Article 1, Section 10 of the Constitution of the United States prohibiting any state from passing an *ex post facto* law, nor in conflict with the provisions of the fourteenth amendment to the Constitution of the United States prohibiting any state from passing a law which shall deprive any person of property without due process of law.

APPENDIX

GENERAL STATUTES OF CONNECTICUT REVISION OF 1918

Section 1127. **Assessors to publish notices requiring list.** The assessors in each town, except as otherwise specially provided by law, shall on or before the fifteenth day of October annually post on the signposts therein, or publish in a newspaper published in said town, or if no newspaper is published in said town, then in any newspaper published in the state having a general circulation in said town, a notice requiring all persons therein, liable to pay taxes, to bring in written or printed lists of the taxable property belonging to them on the first day of October in that year.

Section 1138. **Tax lists, when to be given in.** Each resident of any town liable to give in a list and pay taxes therein shall, except as otherwise specially provided by law, on or before the first day of November, annually give in his list, made and sworn to as prescribed by law, making a separate description of each parcel of real estate; and where reference can be made to a map on file in the town clerk's office such reference shall be sufficient description; and if he shall neglect or refuse so to do, the assessors shall fill out a list for him, putting therein all property which they have reason to believe is owned by him, liable to taxation, at the actual valuation thereof from the best information they can obtain, and add thereto ten per centum of such valuation, and in said list they shall make a separate description and valuation of each parcel of real estate. When the first day of November comes on Sunday, then the list may be made out and sworn to the day following.

Section 1149. **Perfected lists and abstract for public inspection. Penalty.** When the lists of any town shall have

been so received or made by the assessors, they shall equalize the same, if necessary, and make any assessment omitted by mistake or required by law. Said assessors may increase or decrease the valuation of property as named in any of said lists or in the last preceding grand list, but in each case of any increase of valuation above the valuation of such property in the last preceding grand list they shall give written notice, in person or by mail, of such increase, to the party whose list or valuation is so changed. When said lists are so completed, said assessors shall arrange said lists in alphabetical order, and lodge the same, except as otherwise specially provided by law, in the town clerk's or assessors' office, on or before the thirty-first day of January, for public inspection. The assessors of every town shall make an abstract of said lists, including the ten per centum added thereto, and, except as otherwise specially provided by law, shall lodge said abstract in the town clerk's office, on or before the thirty-first day of January for public inspection. Any assessor who shall fail to comply with any provision of this section shall be fined five dollars.

Section 1188. **Payment to state treasurer of taxes on choses in action.** Any person may take or send to the office of the treasurer of this state any bond, note, or other chose in action, or a description of the same, and may pay to the state a tax of two per centum on the face amount thereof for five years or, at the option of such person, for a greater or less number of years at the same rate, under such regulations as the treasurer may prescribe, and the treasurer shall thereupon make an indorsement upon said bond, note or other chose in action, or shall give a receipt for the tax thereon, describing said bond, note or other chose in action, certifying that the same is exempt from all taxation for the period of five years, or for such longer or shorter period for which a proportionate tax has been paid, which indorsement

or receipt shall be duly dated and signed in the name of the treasurer and with the seal of the treasurer affixed. Said treasurer shall keep a record of such indorsements and receipts with a description of such bonds, notes or other choses in action, together with the name and address of the party presenting the same and date of registration; and said treasurer shall, annually, on or before the tenth day of November, mail to the town clerk of each town a general description of all such bonds, notes or other choses in action so registered before the first day of the October preceding by persons residing in such town, the date and period of such registration, and the names of the persons by whom the same were registered; and all bonds, notes or other choses in action so indorsed, or described in such a receipt, shall be exempt from all taxation in the state during the period for which said tax is so paid.

Section 1190. **Rate of tax on property on which no state or municipal tax was paid in preceding year.** All taxable property of any estate upon which no town or city tax has been assessed as provided in section 1189 or upon which no tax has been paid to the state during the year preceding the date of the death of the decedent, shall be liable to a tax of two per centum per annum on the appraised inventory value of such property for the five years next preceding the date of the death of such decedent, provided, the executor or administrator of any estate may, by furnishing evidence to the satisfaction of the tax commissioner that a state, town or city tax has been paid on any of such property for a portion of said five years or that the ownership of such property has not been in the decedent for a portion of said period, obtain a proportionate deduction from the tax hereby imposed, and provided, the administrator or executor of such estate may furnish evidence to the tax commissioner that the appraised value of the estate is not in excess of two

thousand dollars and a portion of the same passes by will or pursuant to the provisions of the statutes relating to the distribution of intestate estates, to the widow or minor children, as provided in section 1189.

Section 1191. **Tax Commissioner to notify state treasurer and court of probate when any tax is due.** Within ninety days after receipt of the inventory and affidavit, or corrected, amended or supplemental inventory and appraisal of an estate, the tax commissioner shall file with the state treasurer and with the court of probate wherein such estate is in course of settlement, a statement of the name of any estate which is liable for such tax and the amount thereof. The tax commissioner may, at any time within ninety days, correct such statement on account of an error or omission by sending a corrected statement to the treasurer and judge of probate, showing the name of the estate and the amount of tax as corrected. Such court of probate shall, within ten days from the receipt of such statement or corrected statement, mail a copy of the same to the executor, administrator or representative of such estate at his last known address.

Section 1192. **Appeal from the decision of the tax commissioner allowed.** Any executor, administrator or representative of such an estate aggrieved by the action of the tax commissioner in determining such tax, if unable to agree with the tax commissioner upon the amount of such tax as provided in section 1190, may, within ninety days from the time of the filing by the tax commissioner of such statement or corrected statement with the judge of probate, make application in the nature of an appeal therefrom to the superior court of the county in which such probate court is located which shall be accompanied by a citation to said tax commissioner to appear before such court. Such citation shall

be signed by the same authority and such appeal shall be returnable at the same time and served and returned in the same manner as is required in case of a summons in a civil action. The authority issuing such citation shall take from the applicant a bond or recognizance in the sum of one hundred and fifty dollars to said tax commissioner, with surety to prosecute the application to effect and to comply with the orders and decrees of the court in the premises. Such applications shall be preferred cases, to be heard, unless cause appear to the contrary, at the first session, by the court and the pendency of such application shall, subject to the order of the court, suspend action upon the tax against the applicant. Such court shall have power to grant such relief as the law allows, and upon such applications costs may be taxed at the discretion of the court.

Section 5007. **Order of payment of claims.** On the final settlement of the estate the court of probate shall direct the payment of claims against such estate to be made in the following order: First, the funeral expenses and the expenses of settling the estate; second, debts due for the last sickness of the deceased; third, all lawful taxes and all debts due to the state and to the United States; fourth, all debts due to any laborer or mechanic for personal wages for labor performed by such laborer or mechanic for the deceased within three months next preceding the decease of such person; fifth, other preferred claims; and last, all other debts allowed in proportion to their respective amounts.

thousand dollars and a portion of the same passes by will or pursuant to the provisions of the statutes relating to the distribution of intestate estates, to the widow or minor children, as provided in section 1189.

Section 1191. **Tax Commissioner to notify state treasurer and court of probate when any tax is due.** Within ninety days after receipt of the inventory and affidavit, or corrected, amended or supplemental inventory and appraisal of an estate, the tax commissioner shall file with the state treasurer and with the court of probate wherein such estate is in course of settlement, a statement of the name of any estate which is liable for such tax and the amount thereof. The tax commissioner may, at any time within ninety days, correct such statement on account of an error or omission by sending a corrected statement to the treasurer and judge of probate, showing the name of the estate and the amount of tax as corrected. Such court of probate shall, within ten days from the receipt of such statement or corrected statement, mail a copy of the same to the executor, administrator or representative of such estate at his last known address.

Section 1192. **Appeal from the decision of the tax commissioner allowed.** Any executor, administrator or representative of such an estate aggrieved by the action of the tax commissioner in determining such tax, if unable to agree with the tax commissioner upon the amount of such tax as provided in section 1190, may, within ninety days from the time of the filing by the tax commissioner of such statement or corrected statement with the judge of probate, make application in the nature of an appeal therefrom to the superior court of the county in which such probate court is located which shall be accompanied by a citation to said tax commissioner to appear before such court. Such citation shall

be signed by the same authority and such appeal shall be returnable at the same time and served and returned in the same manner as is required in case of a summons in a civil action. The authority issuing such citation shall take from the applicant a bond or recognizance in the sum of one hundred and fifty dollars to said tax commissioner, with surety to prosecute the application to effect and to comply with the orders and decrees of the court in the premises. Such applications shall be preferred cases, to be heard, unless cause appear to the contrary, at the first session, by the court and the pendency of such application shall, subject to the order of the court, suspend action upon the tax against the applicant. Such court shall have power to grant such relief as the law allows, and upon such applications costs may be taxed at the discretion of the court.

Section 5007. **Order of payment of claims.** On the final settlement of the estate the court of probate shall direct the payment of claims against such estate to be made in the following order: First, the funeral expenses and the expenses of settling the estate; second, debts due for the last sickness of the deceased; third, all lawful taxes and all debts due to the state and to the United States; fourth, all debts due to any laborer or mechanic for personal wages for labor performed by such laborer or mechanic for the deceased within three months next preceding the decease of such person; fifth, other preferred claims; and last, all other debts allowed in proportion to their respective amounts.

PUBLIC ACTS OF 1919

STATE OF CONNECTICUT

Chapter 50. **An Act amending an Act concerning Inventories of Estates.** Section 1189 of the general statutes is amended to read as follows: The executor of every will and the administrator of every estate except as hereinafter provided, at the time of filing the inventory and appraisal of such estate with the court of probate, shall, in addition thereto, file an affidavit in duplicate setting forth the items included in such inventory on which a tax has been assessed by any town or city during the last completed taxing period, or paid to the state during the year next preceding the date of the death of the decedent, the assessed value of each item and the place of the assessment or payment of the tax on each item, and the judge of probate shall send to the tax commissioner, with the copy of each inventory required to be sent to said commissioner, a copy of such affidavit. Each judge of probate, in addition to the copies of other inventories required to be filed with the tax commissioner shall file with said commissioner a copy of the inventory and appraisal of each estate in process of settlement in his court less than one thousand dollars in value, which includes taxable property upon which no town or city tax has been assessed during the last completed taxing period, or upon which no state tax has been paid during the year next preceding the date of the death of the decedent. The term "completed taxing period" as herein used means the time allowed for the assessors and board of relief to complete their duties. Any estate the appraised value of which is not in excess of two thousand dollars and any portion of which passes, by will or pursuant to the provisions of the statutes of this state relating to the distribution of intestate estates, to the widow or minor children, shall be exempt from the provisions of this section and section 1190 of the general statutes.